

**SUBPART I & J,
MISCELLANEOUS
REVISIONS**

PUBLIC HEARING DRAFT
PROPOSED AMENDMENTS TO 310 CMR 40.0000, THE MASSACHUSETTS CONTINGENCY PLAN

NOTIFICATION

1. NOTE TO REVIEWERS: *In the 1999 changes to the MCP, the description of "surficial soil" was changed from 6 inches to "soil (within a depth of 12 inches, but as close to the surface as possible)." This has caused some confusion, particularly at sites where two co-located samples may have been taken. For example, consider two samples: one scraping the surface and another at some depth (say 8"). Does the 8" sample trigger notification, even if the sample closer to the surface does not? DEP believes strongly that notification criteria should be black-and-white, without ambiguity, given the consequences for failure to notify.*

For Imminent Hazard determinations, the relevant sample is the one closest to the surface, as that sample best represents potential exposure under current site conditions. However, in the absence of more surficial samples, samples as deep as 12" (not just to 6") may be sufficiently representative of surficial conditions to be used with the listed criteria. DEP seeks comment on the two options presented below.

DEP seeks comments on whether the variability of sample concentration over a short (spatial) interval renders any observed differences between two "co-located" samples virtually irrelevant without a significant number of samples.

In a separate proposed change, the table presented in 310 CMR 40.0321(2) has been updated to clarify that the Imminent Hazard trigger level for hexavalent chromium (200 µg/g) applies to Total Chromium only in the absence of Cr VI data.

Option 1 – *Under Option 1 DEP proposes to clarify the notification requirement by stating that any sample taken within the top twelve inches could trigger notification.*

40.0321: Reporting of Releases and Threats of Release that Pose or Could Pose an Imminent Hazard

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(2) For the purpose of fulfilling the "Two Hour" release notification obligations of 310 CMR 40.0311(7), the following releases could pose an Imminent Hazard to human health:

- (a) a release to the environment indicated by the measurement of oil and/or hazardous material in a private drinking water supply well at a concentration equal to or greater than ten times the Category RCGW-1 Reportable Concentration, as described in 310 CMR 40.0360 through 40.0369 and listed at 310 CMR 40.1600; or
- (b) a release to the environment indicated by the measurement of concentrations of hazardous material, equal to or greater than any of the following concentrations ~~of hazardous material in surficial soil (at the ground surface or within a depth of twelve inches below the ground surface) within a depth of 12 inches, but as close to the surface as possible~~, at any location within 500 feet of a residential dwelling, school, playground, recreation area or park, unless access by children is controlled or prevented by means of bituminous pavement, concrete, fence, or other physical barrier:

Hazardous Material	CAS number	Concentration (ug/g dry wt)
Arsenic (total)	7440382	40
Cadmium (total)	7440439	60
Chromium (VI) or	18540299	200
Total Chromium <u>in the absence</u>		

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of CrVI data)

Cyanide (available)	57125	100
Mercury (total)	7439976	300
Methyl Mercury	22967926	10
PCB (total)	1336363	10

Option 2 -: Under Option 2 DEP proposes to incorporate some flexibility in the cases of collocated samples by explicitly stating that the sample nearest to the ground surface determines the notification requirement. Given how few collocated samples are taken within the top 12", it is questionable whether the flexibility in this option is worth the ambiguity. Further, this option may not be justified considering the relative lack of site assessment data that is typically available. Option 2 would add the following sentence immediately after the list of chemical concentrations in 310 CMR 40.0321:

In the event that two or more samples are taken at the same location and within twelve inches of the ground surface, the sample closest to the ground surface shall be used to determine the "Two Hour" release notification obligation.

Option 3: No Change to the language concerning the depth of samples.

IMMINENT HAZARD EVALUATION

2. NOTE TO REVIEWERS: The same "within a depth of twelve (12) inches, but as close to the surface as possible" language discussed earlier in the proposed changes to 310 CMR 40.0321 appears in Subpart I at 310 CMR 40.0953(2). DEP proposes the following three options for clarifying 310 CMR 40.0953.

Option 1:

40.0953: Exposures to be Considered in Imminent Hazard Evaluations

- (2) For the evaluation of soil-related exposures, the levels of oil and/or hazardous material in the accessible surficial soil at the ground surface or within twelve inches of the ground surface (as close to the ground surface as possible but in no case greater than 12 inches) shall be considered in the development of the Exposure Point Concentrations

Option 2: Same as the proposal above, but with the following sentence added to the end of 40.0953(2):

In the event that two or more samples are taken at the same location and within twelve inches of the ground surface, greater consideration shall be given those samples closest to the ground surface.

Option 3: No Change

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REPORTABLE CONCENTRATIONS FOR OHM

3. NOTE TO REVIEWERS: *Proposed changes to the Reportable Concentrations in Soil (310 CMR 40.1600) for Chromium (Total Chromium), trivalent chromium (Cr III) and hexavalent chromium (Cr VI) set the RC for Total Chromium equal to that for Cr VI since, under certain environmental conditions, hexavalent chromium may be a significant fraction of total concentration. The following language, modeled on existing language for petroleum hydrocarbons at 310 CMR 40.0360(2), is proposed to allow species-specific data to overrule a notification obligation based solely on Total Chromium data. The Department seeks comment on the concept, as well as the appropriateness of the language.*

40.0360: Reportable Concentrations for Oil and Hazardous Material

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(4) The Reportable Concentration for Chromium shall be the Reportable Concentration established in 310 CMR 40.1600 for Chromium or the Reportable Concentrations established in 310 CMR 40.1600 for the specific species of chromium. Notification shall not be required for sites solely on the basis of a measurement of Total (unspeciated) Chromium equal to or greater than the Reportable Concentration for Chromium if data exists demonstrating that the concentrations of Hexavalent Chromium (Cr VI) and Trivalent Chromium (Cr III) are both less than the applicable Reportable Concentrations established in 310 CMR 40.1600.

(45) The Reportable Concentration values for the hazardous materials listed at 310 CMR 40.1600, including hazardous materials that may be components of oil or waste oil, shall be compared to concentrations of hazardous material in soil or groundwater that have been measured by the analytical procedures detailed in EPA Publication SW-846, "Test Methods for Evaluating Solid Waste", or any other appropriate analytical procedure, as described in 310 CMR 40.0017, and where there is greater than a 95% probability that the reported analyte is present at or above the Reportable Concentration.

(56) The techniques utilized for obtaining soil and groundwater samples for comparison to the Reportable Concentration values listed at 310 CMR 40.1600 shall be in conformance with generally accepted practices and procedures, consistent with the Response Action Performance Standard described in 310 CMR 40.0191, and shall not involve measures or steps that are undertaken to cause or promote the dilution of analyte values for the sole purpose of avoiding reporting obligations imposed in 310 CMR 40.0315.

(67) Persons notifying the Department of a release under the provisions of 310 CMR 40.0315 and 40.0360 through 40.0369 shall specify whether the measured concentration of one or more of the listed substances in 310 CMR 40.1600 constitutes a release of oil, hazardous material, or both oil and hazardous material. Such a determination shall be based upon:

- (a) factual evidence relating to the source and mechanism of the release;
- (b) factual evidence relating to the storage, use and disposal of oil and hazardous material at the site of the release; and/or
- (c) analytical characterization of the release.

EXPOSURE POINTS

4. NOTE TO REVIEWERS: *In the 1999 regulations, a section was inadvertently deleted from 310 CMR 40.0924(4) from the selection of Exposure Points discussion. Specifically, the identification of "Hot Spots" as distinct Exposure Points was deleted from the regulations. DEP proposes to reinstate the deleted language.*

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(4) Hot spots shall be considered distinct Exposure Points.

(45) Examples of typical Exposure Points for disposal sites shall include, without limitation:

- (a) an existing public or private water supply;
- (b) a future drinking water supply;
- (c) a hot spot of contamination in a neighborhood playground;
- (d) a volume of subsurface soil at a potential construction site;
- (e) a distant shellfish bed.

EXPOSURE POINT CONCENTRATIONS

5. NOTE TO REVIEWERS: *The following changes are intended to clarify changes made in 1999. This proposal is more specific about when average, upper confidence limits on the mean, and maximum values should be used for the Exposure Point Concentration, particularly separating out the way you treat uncertainty due to small sample size versus seasonal variability.*

40.0926: Identification of Exposure Point Concentrations and other Data Criteria

(1) For each oil and/or hazardous material in each medium at each Exposure Point, an Exposure Point Concentration shall be identified and documented.

(2) Exposure Point Concentrations shall be determined or estimated in a manner consistent with the type and method of Risk Characterization which is being performed.

(3) In estimating the Exposure Point Concentration, the objective shall be to identify a conservative estimate of the average concentration contacted by a receptor at the Exposure Point over the period of exposure.

(a) Maximum concentrations shall be used to estimate an Exposure Point Concentration under the following conditions:

- 1. evaluations of acute exposures;
- 2. evaluations of chemicals associated with lethal or severe health effects from short-term exposures;
- 3. screening assessments that evaluate maximum exposure potential to streamline the assessment process; or
- 4. evaluations of exposures for which the data available to characterize temporal variability or the spatial distribution of site concentrations is limited.

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including when there is insufficient data to adequately characterize the effects of seasonal variation on groundwater contaminant concentrations.

(b) For chronic and subchronic exposures (other than for screening evaluations), the arithmetic average of site data is acceptable as an Exposure Point Concentration, provided **either** of the following criteria are met:

1. For discrete or composite samples, the arithmetic average is less than or equal to the applicable standard or risk-based concentration limit, seventy-five (75) percent of the data points used in the averaging procedure are equal to or less than the applicable standard or risk-based concentration limit, and no data point used in the averaging is ten times greater than the applicable standard or risk-based concentration limit; **or**

2. A valid justification is provided indicating that the sample mean is unlikely to **substantially** underestimate the true mean of the concentration of oil or hazardous material at the Exposure Point. Such a demonstration should include, but need not be limited to, consideration of the observed distribution of the data, sampling strategy (including frequency, density, and potential biases), graphical representation of analytical results, and/or statistical analyses.

(c) For chronic and subchronic exposures (other than for screening evaluations), the use of maximum concentrations or the **ninety-fifth** (95th) percentile upper confidence limit on the mean, **whichever is lower**, shall be used to estimate an Exposure Point Concentration when the criteria specified in 310 CMR 40.0926(3)(b) are not met. In such cases, the sample size is likely to be insufficient for the simple arithmetic average to estimate the true value with reasonable confidence and there is a considerable probability of substantially underestimating the mean.

(4) In determining the concentrations to compare to Upper Concentration Limits, the objective shall be to provide a conservative estimate of the average concentration within the site, and the average concentration within any Hot Spots within the site. A conservative estimate of the average concentration should be developed in accordance with 40.0926(3).

(5) In determining the concentrations to evaluate Hot Spots, the objective shall be to provide a conservative estimate of the average concentration within the Hot Spot. A conservative estimate of the average concentration should be developed in accordance with 40.0926(3).

~~In determining or estimating the Exposure Point Concentration, the objective shall be to identify a conservative estimate of the arithmetic mean concentration which represents the average concentration contacted by a receptor at the Exposure Point over the period of exposure. Concentrations identified to evaluate Upper Concentration Limits or Hot Spots shall provide a conservative estimate of the arithmetic average concentration in the specified area.~~

~~(a) The use of upper percentiles, or maximum concentrations is appropriate for certain evaluations, and shall be considered when conducting:~~

~~1. evaluations of acute exposures;~~

~~2. evaluations of chemicals associated with lethal or severe health effects from short-term exposures; or~~

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~~3. screening evaluations which intentionally over-estimate potential exposures to streamline the assessment process.~~

~~(b) The use of upper percentile, or maximum concentrations is appropriate when a simple arithmetic average of the available data is likely to underestimate the true mean, including:~~

~~1. evaluations of site conditions for which there is insufficient data or other information to adequately characterize the site (e.g. when there is insufficient data to adequately characterize the effects of seasonal variation on groundwater contaminant concentrations);~~

~~2. evaluations using concentration data with a high degree of variability. The acceptability of site data for arithmetic averaging for Exposure Point Concentrations, comparison to Upper Concentration Limits or determination of Hot Spots shall be demonstrated by any one of the following criteria:~~

~~a. For discrete or composite samples, the arithmetic average is less than or equal to the applicable standard or risk-based concentration limit, seventy-five percent of the data points used in the averaging procedure are equal to or less than the applicable standard or risk-based concentration limit, and no data point used in the averaging is ten times greater than the applicable standard or risk-based concentration limit.~~

~~b. A valid justification is provided indicating that the sample mean is unlikely to underestimate the true mean of the concentration of oil or hazardous material at the Exposure Point. Such a demonstration may include, but need not be limited to, consideration of the observed distribution of the data, sampling strategy, graphical representation of analytical results, and/or statistical analyses with sufficient Power and Confidence.~~

~~(c) Assessments conducted using a probabilistic analysis may use a distribution of Exposure Point Concentrations, provided that the data are sufficient to provide a reliable distribution and the use of a distribution is consistent with the nature of the evaluation being performed.~~

(46) Exposure Point Concentrations may be developed using monitoring data gathered during the site investigation or, when appropriate, through the use of fate and transport models generally accepted by the environmental modelling community.

(57) Any mathematical equations or models used to identify Exposure Point Concentrations shall be clearly documented.

GROUNDWATER CATEGORIZATION

6. NOTE TO REVIEWERS: *The following language makes explicit the formerly implicit change in groundwater category that would occur if a building were constructed in an area with shallow groundwater.*

40.0932: Identification of Applicable Groundwater Categories

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(6) Groundwater Category GW-2. Groundwater shall be defined to be in category GW-2 if it is located within 30 feet of an existing occupied building or structure, and the average annual depth to groundwater in that area is 15 feet or less. Category GW-2 groundwater is considered to be a potential source of vapors of oil and/or hazardous material to indoor air. Construction of a building in an area in which the average annual depth to groundwater is 15 feet or less will change the groundwater category at the site to include GW-2; change the activities, uses and/or exposures at the disposal site; and may negate the notification exemption described at 310 CMR 40.0317(17).

SELECTION OF METHOD

7. NOTE TO REVIEWERS: *In 1999, the Method 1 soil standards were derived without incorporating the soil-to-indoor air pathway, on the understanding that LSPs and consultants recognize that volatiles in soil directly adjacent to a building have the potential to impact indoor air, and that consultants would follow-up on this potential migration pathway. Hindsight reveals that this understanding has been lost in the widely held assumption that the Method 1 standards are all-inclusive and protective under all circumstances.*

DEP proposes to address this issue by adding language in the Selection of Method section to prohibit the use of Method 1 in situations where the soil-to-indoor air pathway may be problematic and unassessed.

40.0942: Selection of Method to Characterize the Risk of Harm to Health, Public Welfare and the Environment

The three Methods for Risk Characterization described in 310 CMR 40.0941(3) have been developed to provide a range of approaches which vary in detail and circumstances of use, each of which provides equivalent levels of protection to health, public welfare and the environment. Any of the three Risk Characterization Methods may be employed at a disposal site, subject only to the following limitations:

(1) Method 1 relies upon the use of numerical standards for chemicals in groundwater and soil to characterize risk of harm to health, public welfare and the environment. These standards are referred to as "MCP Method 1 Standards," and are listed in 310 CMR 40.0970 through 40.0979. Method 1 shall only be used to characterize risk at a disposal site if there is a promulgated MCP Method 1 Standard for each oil and hazardous material of concern at the disposal site.

(a) If no MCP Method 1 Standard has been promulgated for one or more oil or hazardous material in soil or groundwater at the disposal site, then the following options are available:

1. The RP, PRP or Other Person may develop such standards under Method 2. Such standards may be used alone or in combination with other MCP Method 1 Standards to characterize risk at the disposal site. A combined Method 1 and Method 2 approach shall be considered a Method 2 Risk Characterization; or

2. Method 3 alone may be used to characterize risk at the disposal site.

(b) If oil or hazardous material at the disposal site is present in, or is likely to migrate at potentially significant concentrations to an environmental medium in addition to groundwater and soil (such as in sediments, within surface water, or

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within ambient or indoor air), then Method 1 alone shall not be used to characterize the risk at the disposal site, and the following options are available:

1. If it is demonstrated that the current or foreseeable future human exposure to the oil and/or hazardous material would occur predominantly through contact with the groundwater or soil, then the MCP Method 1 Standards may be used to characterize the risk of harm to human health posed by the disposal site. Method 3 then would be used to characterize the risk of harm to public welfare and the environment posed by the contamination in all other affected media. Such an approach shall be considered to be a combined Method 1 and Method 3 Risk Characterization; or

2. Method 3 alone may be used to characterize risk at the disposal site.

(c) If Environmental Receptors have been identified for the disposal site as described in 310 CMR 40.0922, and if oil and/or hazardous material known to bioaccumulate are present within two feet of the ground surface, then Method 1 alone shall not be used to characterize the risk at the disposal site, and the following options are available:

1. The MCP Method 1 Standards may be used in combination with a Method 3 Stage I Environmental Screening to characterize the risk of harm to health, public welfare and the environment. Such an approach shall be considered to be a combined Method 1 and Method 3 Risk Characterization; or

2. Method 3 alone may be used to characterize risk at the disposal site.

(d) If one or more Volatile Organic Compounds is present in soil adjacent to an occupied structure (within six feet, measured horizontally from the wall of the structure, and within ten feet, measured vertically from the basement floor or foundation slab) then the soil has the potential to result in significant indoor air concentrations of OHM and Method 1 alone cannot be used to characterize the risk at the disposal site. The following options are available:

1. The MCP Method 1 Standards may be used in combination with a demonstration that the soil concentrations of Oil and Hazardous Material are not likely to be a significant contributor to the Cumulative Receptor Risk at the site by the indoor air exposure pathway. Such a demonstration may be based on measured or modeled concentrations in soil gas or indoor air.
2. MCP Method 3 alone may be used to characterize risk at the disposal site.

(2) Method 2 allows the consideration of limited site-specific information to supplement the use of MCP Method 1 Standards for groundwater and soil. As a result, the limitations and options described for the use of Method 1 in 310 CMR 40.0942(1) are also applicable to the use of Method 2.

(3) Method 3 may be used at any disposal site to characterize the risk of harm to health, public welfare and the environment.

IMMINENT HAZARD EVALUATIONS

8. NOTE TO REVIEWERS: *Three changes are proposed for the evaluation of Imminent Hazards. First, consistent with the proposed change for Method 3 Risk Characterizations [310 CMR 40.0993(5), below], DEP is proposing that primary consideration should be given to DEP-derived toxicity information.*

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While DEP generally relies on the USEPA for published toxicity values, DEP occasionally independently reviews the literature and publishes values appropriate for use in MCP risk characterizations. These values are available on the DEP website at <http://Mass.Gov/dep/ors/orspubs.htm>. Second, the Noncancer Risk Limit for certain specified chemicals is reduced from a Hazard Index of 10 to a HI=1. These chemicals (cyanide, lead and perchlorate) are associated with serious adverse health effects following short-term exposures to sensitive subpopulations. Finally, DEP has chosen to list specific concentrations of these same chemicals in drinking water that are defined to pose an Imminent Hazard. Publication of these Imminent Hazard levels are intended to simplify Imminent Hazard Evaluations and facilitate Immediate Response Actions at these sites.

40.0955: Imminent Hazard Risk Characterization and Outcome

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(2) The characterization of the risk of harm to human health shall be conducted using Method 3, as described in 310 CMR 40.0993.

(a) The toxicity information used to characterize risk shall be consistent with the type and duration of exposure under evaluation, and shall be clearly identified and documented. Primary consideration shall be given to information developed by the Massachusetts Department of Environmental Protection~~U.S.—Environmental Protection Agency~~ for the purpose of conducting such risk assessments. Examples of such toxicity information include:

1. Reference Doses and Reference Concentrations; and
2. Carcinogenic Slope Factors and Unit Risk values.

(b) The conditions at the disposal site pose an Imminent Hazard based upon the potential for carcinogenic health effects if, for the oil and/or hazardous materials evaluated and for each receptor, the estimated Excess Lifetime Cancer Risk is greater than a cancer risk limit which is an Excess Lifetime Cancer Risk equal to one-in-100,000.

(c) The conditions at the disposal site pose an Imminent Hazard based upon the potential for non-cancer health effects if, for the oil and/or hazardous materials evaluated and for each receptor, the non-cancer risk calculated is greater than a non-cancer risk limit of:

1. a Hazard Index equal to one for cyanide, lead and perchlorate, due to the potential for developmental effects or lethality following short-term exposures; and
2. a Hazard Index equal to ten, for all other oil or hazardous materials.

(d) A release to the environment which produces readily apparent effects to human health poses an Imminent Hazard. A quantitative evaluation of such exposures is not required.

(e) A release to the environment which results in concentrations of oil and/or hazardous material in a drinking water supply equal to or greater than the following levels shall be considered an Imminent Hazard. A quantitative evaluation of such exposures is not required.

<u>Hazardous Material</u>	<u>CAS Number</u>	<u>Concentration</u> (<u>µg/L</u>)
<u>Cyanide (available)</u>	<u>57125</u>	<u>200</u>
<u>Lead</u>	<u>7439921</u>	<u>15</u>
<u>Perchlorate</u>	<u>-</u>	<u>1</u>

(e)f) The mathematical equations used to calculate the risk estimates shall be clearly presented and documented.

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40.0956: Substantial Hazard Evaluation

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- (3) No assessment of Substantial Hazard ~~assessment~~ is required if a condition of No Significant Risk exists and the site is eligible for a Class A or Class B Response Action Outcome.

DEVELOPMENT OF METHOD 2 STANDARDS

9. NOTE TO REVIEWERS: *The proposed changes to the MCP numerical standards require parallel changes to the regulations that govern the creation of new standards under Method 2 of the MCP. These changes track the methodological updates to the MCP standards. Reviewers should familiarize themselves with the discussions of the changes to the Numerical Standards at <http://Mass.Gov/dep/bwsc/files/workgrps/numbers/numbers/htm>. There are four significant changes to this section:*

1. *The generic source attenuation factor previously applied to all chemicals has been replaced by a chemical-specific attenuation factor (310 CMR 40.0983(2)(c)).*
2. *The dilution factor (d) previously applied to all chemicals has been eliminated, as discussed in the paper "An Evaluation of Vapor Intrusion Into Buildings Through a Study of Field Data" by Nancy Fitzpatrick and John Fitzgerald (<http://Mass.Gov/dep/nero/bwsc/pubs.htm>)*
3. *The Average Daily Exposure and Lifetime Average Daily Exposure to soil for dermal contact have been reduced based on new data regarding the adherence of soil to skin. The values for ingestion of soil have also been slightly adjusted (with no significant difference) following a simplification of the equations used to calculate the estimates.*
4. *The S-3 standard is adopted as the S-2 value for chemicals for which the calculated S-3 value is lower than the corresponding S-2 value. This occurs when the standard is based on non-cancer health effects and the subchronic Reference Dose is equal to (or only slightly greater than) the chronic Reference Dose.*

For the derivation of the S-1 Soil Standards, the Method 2 derivation described below does not include a gardening/vegetable intake pathway. DEP has reviewed the available literature for the uptake of soil contaminants by plants and has concluded that sufficient data is available for only a limited number of chemicals. DEP has already calculated Method 1 standards for these chemicals. Since a Method 2 derivation would be used for somewhat less common contaminants unlikely to have known plant uptake coefficients, DEP believes that inclusion of the vegetable pathway is not necessary at this time.

40.0983: Derivation of Additional Method 1 Groundwater Standards for Use in Method 2.

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- (2) GW-2 Standards shall be determined as follows:
- (a) A risk-based indoor air concentration shall be identified by choosing the lower non-zero value from the following:
1. A concentration equal to 20% of a Reference Concentration (RfC) published by the U.S. EPA, or an analogous allowable concentration is identified when sufficient information exists.
 2. An indoor air concentration associated with an Excess Lifetime Cancer Risk of one-in-one million, using the following equation, when sufficient information exists:

$$[\text{OHM}]_{\text{air}} = 10^{-6} \frac{\text{RfC}}{\text{UR}_{\text{air}}}$$

Where:

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[OHM] _{air} =	The calculated indoor air concentration. In units of: µg/cubic meter.
10 ⁻⁶ =	A one-in-one-million Excess Lifetime Cancer Risk (dimensionless)
UR _{air} =	The Unit Risk in air for the chemical, published by the U.S. EPA. In units of: (µg/cubic meter) ⁻¹

3. The concentration in air of the oil and/or hazardous material at which 50% of the population can detect its odor is identified, if available.
- (b) A background indoor air concentration for the chemical shall be identified and compared to the risk-based concentration calculated in 310 CMR 40.0983(2)(a). The higher of the two values shall be chosen as the target indoor air concentration.
- (c) A source attenuation factor, α , shall be determined for the oil and/or hazardous material, assuming conservative site characteristics, including: a depth to groundwater of 3 meters (9 feet), a basement floor both 2 meters (6 feet) below grade and 1 meter (3 feet) above the groundwater table, a soil water-filled porosity equal to 0.06 cm³/cm³, and sandy-loam soil between the groundwater and the basement.
- (de) A concentration in groundwater for the oil and/or hazardous material shall be calculated using the following equation:

$$[\text{OHM}]_{\text{gw}} = [\text{OHM}]_{\text{air}} \div (\alpha * d * H * C)$$

Where:

[OHM] _{gw} =	The calculated GW-2 Standard, in units of: µg/liter (ppb).
[OHM] _{air} =	The target indoor air concentration identified in 310 CMR 40.0983(2)(b). In units of µg/cubic meter.
α =	<u>A source attenuation factor as determined at 310 CMR 40.0983(2)(c). An attenuation factor.</u> Dimensionless.
d =	An applied dilution factor equal to 0.1. Dimensionless.
H =	The Henry's Law Constant for the chemical. Dimensionless.
C =	Units Conversion Factor, 1000 l/m ³ .

- (ed) The site specific groundwater background concentration shall be identified for the oil and/or hazardous material in 310 CMR 40.0983(1) is considered;
- (fe) the Practical Quantitation Limit (PQL) applicable to the oil and/or hazardous material using an appropriately sensitive analytical method for quantifying the concentration of the oil and/or hazardous material in water shall be identified;
- (fg) the highest of the three concentrations identified in 310 CMR 40.0983(2) (ed), (de) and (ef) shall be adopted as the MCP Method 2 GW-2 Standard for that oil and/or hazardous material.

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- (3) GW-3 Standards shall be determined as follows:
- (a) The lowest ecologically-based Water Quality Criterion for the oil and/or hazardous material of concern shall be identified (*i.e.*, the Fresh Water Chronic Criterion, the Fresh Water Acute Criterion, the Marine Chronic Criterion, or the Marine Acute Criterion). If no such criterion exists, an analogous value from the scientific literature may be proposed.
 - (b) The concentration (in µg/liter, or ppb) identified in 310 CMR 40.0983(4)(a) shall be multiplied by a factor of ten. The resulting concentration (in µg/L, or ppb) shall be the MCP Method 2 GW-3 Standard for the oil and/or hazardous material of concern.
- (4) Any of the MCP Method 2 groundwater standards calculated in 40.0983(2) through (4) shall be adjusted to a ceiling concentration of 50,000 µg/liter (ppb) if the calculated value is greater than 50,000 µg/liter (ppb);

40.0984: Derivation of Additional Method 1 Soil Standards for Use in Method 2.

If an MCP Method 1 Soil Standard has not been promulgated by the Department, the RP, PRP or Other Person may develop an MCP Method 2 Standard for that oil and/or hazardous material on the basis of the following assumptions and procedures:

- (1) A site-specific background concentration in soil shall be identified for the oil and/or hazardous material.
- (2) Based upon non-cancer health risk, a concentration of the oil and/or hazardous material associated with 20% of a Reference Dose shall be identified using equations specific to each soil category.

Where:	[OHM] =	the concentration of oil and/or hazardous material being derived, in units: mg/kg (ppm)
	RfD =	the chronic or subchronic U.S. EPA derived Reference Dose for the chemical, in units: mg/(kg * day)
	RAF _{oral} =	the Relative Absorption Factor applicable for oral exposures, dimensionless
	RAF _{dermal} =	the Relative Absorption Factor applicable for dermal exposures, dimensionless
	C =	10 ⁶ mg/kg conversion factor
	0.2 =	20% source allocation factor
	Other numerical values =	Average Daily Exposure to the soil of concern by the oral or dermal pathway. In units: mg _{soil} /(Kg _{bw} * day)

- (a) S-1 Standards: The concentration of the oil and/or hazardous material shall be derived using the following equation:

$$[\text{OHM}] = (\text{RfD}_{\text{chronic}} \times 0.2 \times C) / ((\text{RAF}_{\text{oral}} \times \text{3-12 2.4}) + (\text{RAF}_{\text{dermal}} \times \text{28-5 21}))$$

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(b) S-2 Standards: The concentration of the oil and/or hazardous material is derived using the lower result from the following equations:

$$[OHM] = (RfD_{\text{chronic}} \times 0.2 \times C) / ((RAF_{\text{oral}} \times \del{0.29}{0.27}) + (RAF_{\text{dermal}} \times \del{15.2}{0.5})); \text{ and}$$

$$[OHM] = (RfD_{\text{subchronic}} \times 0.2 \times C) / ((RAF_{\text{oral}} \times 1.3) + (RAF_{\text{dermal}} \times 12.4))$$

(c) S-3 Standards: the concentration of the oil and/or hazardous material is derived using the following equation:

$$[OHM] = (RfD_{\text{subchronic}} \times 0.2 \times C) / ((RAF_{\text{oral}} \times \del{0.63}{1.3}) + (RAF_{\text{dermal}} \times \del{32.49}{12.4}))$$

(3) A concentration of the oil and/or hazardous material associated with an Excess Lifetime Cancer Risk equal to one-in-one million shall be identified using equations specific to each soil category;

Where:	[OHM] =	the concentration of oil and/or hazardous material being derived, in units: mg/kg (ppm)
	CSF =	the U.S. EPA derived oral Carcinogenic Slope Factor, in units: (mg/(kg*day)) ⁻¹
	RAF _{oral} =	the Relative Absorption Factor applicable for oral exposures, dimensionless
	RAF _{dermal} =	the Relative Absorption Factor applicable for dermal exposures, dimensionless
	C =	10 ⁶ mg/kg conversion factor
	Other numerical values =	Lifetime Average Daily Exposure to the soil of concern by the oral or dermal pathway. In units: mg _{soil} /(Kg _{bw} *day)

(a) S-1 Standards: The concentration of the oil and/or hazardous material shall be derived using the following equation:

$$[OHM] = (1 \times 10^{-6} \times C) / (CSF \times ((RAF_{\text{oral}} \times \del{0.41}{0.38}) + (RAF_{\text{dermal}} \times \del{7.3}{4.1})))$$

(b) S-2 Standards: the concentration of the oil and/or hazardous material shall be derived using the following equation:

$$[OHM] = (1 \times 10^{-6} \times C) / (CSF \times ((RAF_{\text{oral}} \times 0.11) + (RAF_{\text{dermal}} \times \del{5.48}{0.19})))$$

(c) S-3 Standards: The concentration of the oil and/or hazardous material shall be derived using the following equation:

$$[OHM] = (1 \times 10^{-6} \times C) / (CSF \times ((RAF_{\text{oral}} \times \del{0.029}{0.01}) + (RAF_{\text{dermal}} \times \del{1.5}{0.09})))$$

REFERENCE TO RESPONSE ACTION PERFORMANCE STANDARDS

10. NOTE TO REVIEWERS: *DEP proposes the following correct typographical errors in references to Response Action Performance Standards.*

40.0986: Determination of Method 2 GW-2 Standards.

(1) MCP Method 1 GW-2 Standards consider the potential for oil and/or hazardous material to volatilize from the groundwater and migrate to indoor air. These standards may be modified under Method 2, or a determination may be made that one or more GW-2 standards are not applicable, based upon site-specific conditions. Modifications of a standard will result in a proposed MCP Method 2 GW-2 Standard. Proposed Method 2 standards or the determination that one or more GW-2 standards are not applicable shall be scientifically justified and sufficiently documented to demonstrate that the Response Action Performance Standard, described in 310 CMR 40.0493-0191 has been met

40.0987: Determination of MCP Method 2 GW-3 Standards.

(1) MCP Method 1 GW-3 Standards consider potential migration of oil and/or hazardous material to surface water. These standards may be modified under Method 2 based upon site-specific conditions to develop MCP Method 2 GW-3 Standards or it may be determined that a discharge to surface water will not occur. The proposed Method 2 modification shall be scientifically justified and sufficiently documented to demonstrate that the Response Action Performance Standard, described in 310 CMR 40.0493-0191, has been met.

40.0992: General Approach to Method 3

Method 3 relies upon detailed information about the site, the oil and/or hazardous material, and potential exposures to Human and Environmental Receptors under all current and reasonably foreseeable Site Activities and Uses to characterize the risk of harm. The scope and level of effort of the Method 3 Risk Characterization shall reflect the site-specific nature of this Method, and the information used to characterize the risk shall be sufficiently documented to demonstrate that the Response Action Performance Standard, described in 310 CMR 40.0493-0191, has been met.

40.0993: Method 3 Human Health Risk Characterization.

...

(5) For each identified Human Receptor, cumulative cancer risks and cumulative non-cancer risks shall be calculated.

(a) Chemical-specific toxicity information used to estimate the cancer and non-cancer risks shall be identified and documented, and the selection of this information shall take into account guidance published by the Department. Primary consideration shall be given to information developed by the Massachusetts Department of Environmental Protection~~U.S. Environmental Protection Agency~~ for the purpose of conducting such risk assessments. Examples of such toxicity information include:

1. Reference Doses and Reference Concentrations; and
2. Carcinogenic Slope Factors and Unit Risks values.

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(b) For receptors who may be exposed to mixtures of oil and/or hazardous material, or through multiple Exposure Pathways at the disposal site, the cumulative risk shall reflect those exposures. Risk estimates are presumed to be additive unless an alternative mechanism is demonstrated to be appropriate.

(c) Risk calculations performed using a probabilistic analysis shall identify the cumulative cancer and non-cancer risks associated with the 95th percentile estimate of exposure.

UPPER CONCENTRATION LIMITS (UCLS)

11. NOTE TO REVIEWERS: *In the 1999 revisions to the regulations, a section was inadvertently deleted from the Upper Concentration Limits (UCLs) discussion, describing how to interpret the comparison of site data to UCLs (i.e., that exceeding UCLs constitutes a Significant Risk). DEP proposes to reinstate the deleted language. In addition, DEP has inserted the phrase “as described at 310 CMR 40.0996(2)”, referring readers back to the section that describes that UCL comparisons are conducted using the arithmetic mean.*

40.0996: Method 3 Upper Concentration Limits

(3) The risk of harm to public welfare and the environment shall also be characterized by comparing the concentration(s) of oil or hazardous material in soil and groundwater to the Upper Concentration Limits in Soil and Groundwater listed in 310 CMR 40.0996(7) or identified pursuant to 310 CMR 40.0996(8).

(a) A level of No Significant Risk of harm to public welfare and to the environment exists or has been achieved for both current and future conditions if ~~no~~ the concentration of oil and/or hazardous material does not exceed an applicable Upper Concentration Limit, as described at 310 CMR 40.0996(2). If the Upper Concentration Limit in Soil or Groundwater for Total Petroleum Hydrocarbon is exceeded, a condition of No Significant Risk shall still be considered to exist if the concentrations of the Aliphatic and Aromatic Hydrocarbon Fractions comprising the TPH are less than or equal to the applicable Upper Concentration Limits in Soil and Groundwater.

(b) Except as provided in 310 CMR 40.0996(4), a level of No Significant Risk of harm to public welfare and to the environment does not yet exist for future conditions if the concentration of one or more oil and/or hazardous materials exceed an applicable Upper Concentration Limit, as described at 310 CMR 40.0996(2). The disposal site may, however, pose No Significant Risk for current conditions and meet the conditions of a Class C Response Action Outcome if all other requirements for a Class C Response Action Outcome are satisfied.

12. NOTE TO REVIEWERS: *In 1999, section 310 CMR 40.0996(8) was added to provide default UCLs for those chemicals not listed in the table at 310 CMR 40.0996(7). The default soil UCL, however, expressed as it is in µg/g, does not apply to asbestos, which is measured in different units. The following language is intended to clarify that there is currently no UCLs for asbestos. The reference in 40.0996(8)(c) to AUL requirements is intended to clarify that the section that limit/require AULs based on a UCL comparison just don't apply if there is no UCL. Is this language necessary if those comparisons in 40.1012 are to “applicable” UCLs and we are defining them not to be applicable to asbestos?*

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DEP has included exemptions from the UCLs for common, relatively nontoxic metals found in the environment with wide ranges of concentrations, such as iron, calcium, sodium and potassium. DEP also seeks comment on additional chemicals that may appropriately be exempted from the UCL requirements.

These asbestos-related changes are also included in a separate regulatory proposal specific to asbestos-in-soil issues. The asbestos-in-soil proposal is available on-line (<http://www.mass.gov/dep/files/pubnot04.htm>) and hearings will be held at the same times/locations as the MCP hearings.

40.0996: Method 3 Upper Concentration Limits

(8) Except as specified in 310 CMR 40.0996(8)(c), ~~f~~For any oil or hazardous material not listed at 310 CMR 40.0996(7), either a default or chemical-specific Upper Concentration Limit must be used.

(a) The default Upper Concentration Limit in Groundwater shall be 10,000 µg/L and the default Upper Concentration Limit in Soil shall be 1,000 µg/g.

(b) The chemical-specific Upper Concentration Limits shall be calculated using the methodology presented at 310 CMR 40.0983 and 310 CMR 40.0984.

1. The Upper Concentration Limit in Groundwater shall be equal to ten times the highest groundwater standard calculated at 310 CMR 40.0983 or 100,000 µg/L, whichever is lower.

2. The Upper Concentration Limit in Soil shall be equal to ten times the highest soil standard calculated at 310 CMR 40.0984, or 10,000 µg/g, whichever is lower.

(c) For the following oil and/or hazardous material, the Upper Concentration Limits in Soil and Groundwater are not applicable. As a result, the comparison of site concentrations to Upper Concentration Limits pursuant to 310 CMR 40.0996(3) is not required, and the need for an Activity and use Limitation shall not be determined by comparison to an Upper Concentration Limit in Soil, as described in 310 CMR 40.1012(2)(a)3. and 310 CMR 40.1012(3)(b).

1. aluminum

2. asbestos

3. calcium

4. iron

5. potassium

6. sodium

13. NOTE TO REVIEWERS: *The following modification changes the reference to the 40.0996 rather than a subsection to comprehensively include the UCLs listed in 40.0996(7) and those determined in 40.0996(8). The latter section was added in 1999, but 40.1012 was not updated at that time to reflect the change.*

40.1012: Application of Activity and Use Limitations

...

(2) Except as provided in 310 CMR 40.1012(3), Activity and Use Limitations shall be required:

(a) at all disposal sites or portions of disposal sites for which a Response Action Outcome and the risk characterization pursuant to 310 CMR 40.0900 used to

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support the RAO are based upon the restriction or limitation of Site Activities and Uses to achieve or maintain a level of No Significant Risk including:

1. any disposal site or portion of a disposal site for which a Response Action Outcome is based on MCP Method 1 or 2 Soil Standards and the Exposure Point Concentrations of oil and/or hazardous material exceed the S-1 standards but meet applicable S-2 or S-3 standards;
 2. any disposal site or portion of a disposal site where a Method 3 Risk Characterization performed pursuant to 310 CMR 40.0990 relies on reduced exposure potential due to the assumption of limited site use; and
 3. any disposal site or portion of a disposal site at which the oil and/or hazardous material in soil located at a depth greater than fifteen feet from the ground surface exceeds an applicable Upper Concentration Limit in Soil listed at 310 CMR 40.0996(7) or determined at 310 CMR 40.0996(8);
- (b) at all disposal sites for which a Response Action Outcome relies upon Exposure Pathway elimination measures to prevent exposure to levels of oil and/or hazardous material that would otherwise pose a significant risk of harm to health, safety, public welfare or the environment; and
- (c) at all sites where an existing private well(s) has been abandoned and the property(ies) served by the private water supply has been connected to a public water supply system in accordance with the provisions of 310 CMR 40.0932(5)(d).

(3) Activity and Use Limitations shall not be required but may be used to provide notice of the existence of residual contamination to future holders of an interest(s) in property that is located within:

- (a) disposal sites or portions of disposal sites where the concentrations of oil and/or hazardous material have been reduced to background or where the requirements described in 310 CMR 40.0923(3)(b) have been met;
- (b) disposal sites or portions of disposal sites at which residual contamination at levels at or below the applicable Upper Concentration Limits for Soil listed or determined in 310 CMR 40.0996(~~7~~) is located at a depth greater than 15 feet from the ground surface;
- (c) any portion of a disposal site where residual contamination is located within a public way or within a rail right-of-way;
- (d) disposal sites or portions of a disposal site for which potential risks are characterized using Method 1 (310 CMR 40.0970) if the levels of oil and/or hazardous material in soil are at or below the applicable Method 1 category S-1 soil standards listed in 310 CMR 40.0975(6);
- (e) at disposal sites or portions of a disposal site for which potential risks are characterized using Method 2 (310 CMR 40.0980) if the levels of oil and/or hazardous material are at or below the applicable category S-1 soil standards identified in 310 CMR 40.0984 and 40.0985;
- (f) disposal sites or portions of a disposal site for which potential risks are characterized using Method 3 (310 CMR 40.0990) if the levels of oil and/or hazardous material pose No Significant Risk pursuant to 310 CMR 40.0990, including comparison to any applicable or suitably analogous standards, and no limitations on site use were assumed or implied in the Risk Characterization;

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- (g) any disposal site or portion of a disposal site where all substantial hazards have been eliminated and where all applicable requirements for a Class C Response Action Outcome have been met pursuant to 310 CMR 40.1050; and
- (h) any other disposal site or portion of a disposal site where an Activity and Use Limitation is not expressly prohibited by 310 CMR 40.1012.

NOTIFICATION AND CLEANUP OF ASBESTOS

14. NOTE TO REVIEWERS: *The following notification requirements are proposed for asbestos and Asbestos Containing Material. The proposal consists of four parts: (1) definitions for asbestos containing debris that parallel the federal definitions under NESHAP, but are specific to asbestos in the environment, (2) notification triggers, (3) notification exemptions, and (4) RAO provisions.*

The notification triggers include:

- *A 2-hour notification requirement for friable asbestos containing material on the soil surface near occupied buildings, schools, playgrounds and parks;*
- *120-day notification requirements for friable asbestos containing material in soil at any depth; and*
- *120-day notification requirements for asbestos-containing debris in accessible soil.*

The notification exemptions, proposed for 310 CMR 40.0317, would cover

- *relatively intact asbestos-containing structures, such as pipes, boilers and duct banks, that are best addressed as an abatement project through the DEP Asbestos Program, and*
- *unconsolidated asbestos fibers not attributable to a release of manufacturing waste.*

Currently, 310 CMR 40.0030 et. seq. establishes requirements that have been designed to ensure that contaminated media containing Oil and Hazardous Materials that could be regulated as “hazardous wastes” pursuant to MGL c. 21C and 310 CMR 30.000 are appropriately managed. While asbestos is already a listed Hazardous Material under the MCP, management of wastes containing asbestos is regulated by the Massachusetts Air Quality Regulations [310 CMR 7.15 (e)] and Solid Waste Management Regulations (310 CMR 19.061), and by the National Emission Standards for Hazardous Air Pollutants (40 CFR 150 et. seq). Therefore, a new paragraph is proposed to be added to 310 CMR 40.0032 (“Contaminated Media and Contaminated Debris” to direct people who are conducting response actions to the appropriate requirements for handling asbestos-contaminated soil. In addition, an amendment of the “anti-degradation” provisions of the MCP in 310 CMR 40.032(3) is proposed to clarify that management of asbestos fibers in soil that would be exempt from both MCP and BWP asbestos program notifications would remain subject to the MCP’s “anti-degradation” provisions. DEP solicits comment as to whether soil contaminated with Asbestos Waste and oil or hazardous material that is not categorized as a hazardous waste should be accompanied by a NESHAP Waste Shipment Record or an MCP Bill of Lading (which would provide an LSP Opinion that the soil is being properly managed, a provision that would not result with the use of the NESHAP Waste Shipment Record).

The RAO provision defines Releasable Asbestos Containing Material present in the top 3 feet of soil to be a continuing source of asbestos to ambient air, thus triggering the RAO provision to eliminate such sources.

Under this proposal, many asbestos-only sites can be addressed without notification under the MCP, either as an abatement project or a Limited Removal Action. The MCP notification triggers are designed to bring in for further evaluation and remediation those conditions that either present a potential imminent hazard or consist of many dispersed friable or small pieces of asbestos containing material over a wide area.

These asbestos-related changes are also included in a separate regulatory proposal specific to asbestos-in-soil issues. The asbestos-in-soil proposal is available on-line

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(<http://www.mass.gov/dep/files/pubnot04.htm>) and hearings will be held at the same times/locations as the MCP hearings.

Debris Containing Friable Asbestos means Debris comprised of any material greater than 3/8 inches in diameter and containing 1 percent or more asbestos by area that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure.

Debris Containing Nonfriable Asbestos means Debris comprised of any material greater than 3/8 inches in diameter containing 1 percent or more asbestos by area that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

Debris Containing Releasable Asbestos from Nonfriable Sources each means (a) Debris Containing Nonfriable Asbestos that has become friable, or (b) Debris Containing Nonfriable Asbestos that has become crumbled, pulverized, or reduced to powder. This term does not include asbestos-containing glue, adhesive or mastic that is not otherwise friable.

40.0317: continued

(22) releases of asbestos to the environment.

(a) indicated solely by the presence of unconsolidated asbestos fibers in soils, provided that the source of the asbestos fibers is not known or likely to be waste materials from asbestos product manufacturing; or

(b) from abandoned asbestos-containing structures, such as pipes, boilers or duct banks, that are intact or substantially intact. For the purposes of this section, "substantially intact" shall mean that the original structure remains recognizable, the visible asbestos-containing Debris appears to have originated from the structure, and that the visible asbestos-containing Debris has not been dispersed more than one foot from the structure.

40.0321: Reporting Releases and Threats of Release that Pose or Could Pose an Imminent Hazard

...

(2) For the purpose of fulfilling the "Two Hour" release notification obligations of 310 CMR 40.0311(7), the following releases could pose an Imminent Hazard to human health:

(a)...

(b)...

(c) a release to the environment indicated by the presence of either 1 cubic foot or more, or 1 pound or more, of Debris Containing Friable Asbestos consisting of insulation, fire-proofing material, plaster or ceiling tiles at the ground surface at any location within 500 feet of an occupied building, playground, recreation area or park.

(cd) a release to the environment for which estimated long-term risk levels associated with current exposures are greater than ten times the Cumulative Receptor Risk Limits in 310 CMR 40.0993(6). Past exposures may be included in such evaluations to the extent that it is reasonable to quantify those exposures.

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40.0315: Releases Which Require Notification Within 120 Days

...

- (6) a release of asbestos to the environment indicated by the presence of:
- (a) 3 or more pieces of Debris Containing Releasable Asbestos from Nonfriable Sources per 10 cubic yards or per 400 square feet, in accessible soil, as defined pursuant to 310 CMR 40.0933(4)(c), except where a 2-hour notification is required pursuant to 310 CMR 40.0321(2)(c); or
 - (b) 3 or more pieces of Debris Containing Friable Asbestos per 10 cubic yards or per 400 square feet, located
 - 1. at the ground surface, except where a 2-hour notification is required pursuant to 310 CMR 40.0321; or
 - 2. at any depth beneath the ground surface.

40.0032 Contaminated Media and Contaminated Debris

...

- (3) Soils containing oil or waste oil at concentrations less than a release notification threshold specified in 310 CMR 40.0300 and 40.1600, and that are not otherwise a hazardous waste, and soils that contain one or more hazardous materials at concentrations less than a release notification threshold, and that are not a hazardous waste, and soils containing unconsolidated asbestos fibers that are exempt from notification as specified in 310 CMR 40.0317, may be transported from a disposal site without notice to or approval from the Department under the provisions of this Contingency Plan, provided that such soil:
- (a) Is not disposed or reused at locations where the concentrations of oil or hazardous materials in the soil would be in excess of a release notification threshold applicable at the receiving site, as delineated in 310 CMR 40.0300 and 40.1600; and
 - (b) Is not disposed or reused at locations where existing concentrations of oil and/or hazardous material at the receiving site are significantly lower than the levels of those oil and/or hazardous materials present in the soil being disposed or reused.
- (4) Soil contaminated solely with Asbestos Waste (as defined in 310 CMR 7.15 and 310 CMR 19.000, including Debris Containing Friable Asbestos and Debris Containing Nonfriable Asbestos) and soil contaminated with Asbestos Waste and oil and/or hazardous materials that are not categorized as hazardous waste pursuant to 310 CMR 30.000, and that is associated with response actions conducted pursuant to 310 CMR 40.0000 and/or with abatement work conducted pursuant to 310 CMR 7.15, shall be managed in accordance with:
- (a) The work practices and disposal requirements described in 310 CMR 7.15(e);
 - (b) The use of a Waste Shipment Record to accompany off-site shipments for disposal described in 40 CFR 61.150(d); and
 - (c) Disposal in an appropriate facility in accordance with 310 CMR 19.061.
- (5) Soil contaminated with Asbestos Waste (as defined in 310 CMR 7.15 and 310 CMR 19.000) and one or more hazardous wastes shall be managed in accordance with the provisions of 310 CMR 30.000, and shall use a Hazardous Waste Manifest to accompany off-site shipments for disposal.

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40.1003: General Provisions for Response Action Outcomes

...

(5) A Class A or Class B Response Action Outcome shall not be achieved unless and until each source of oil and/or hazardous material which is resulting or is likely to result in an increase in concentrations of oil and/or hazardous material in an environmental medium, either as a consequence of a direct discharge or through intermedia transfer of oil and/or hazardous material, is eliminated or controlled.

(a) Such sources may include, without limitation:

1. leaking storage tanks, vessels, drums and other containers;
2. dry wells or wastewater disposal systems which are not in compliance with regulations governing discharges from those systems;
3. contaminated fill, soil, sediment and waste deposits; and
4. non-aqueous phase liquids.

(b) For the purposes of 310 CMR 40.1003(5), the presence of Debris Containing Friable Asbestos or Releasable Asbestos from Nonfriable Sources in accessible soil, pursuant to 310 CMR 40.0933(4)(c), is defined to be a source to ambient air.

~~(bc)~~ For the purposes of 310 CMR 40.1003(5), the downgradient leading edge of a plume of oil and/or hazardous material dissolved in and migrating with groundwater shall not, in and of itself, be considered a source of oil and/or hazardous material.

PRIVATE WELL CLOSURE

15. NOTE TO REVIEWERS: *DEP proposes, at 310 CMR 40.0932, to eliminate the requirement to implement a Grant of Environmental Restriction when a private well is properly abandoned. The requirement for the Grant in such cases is seen as unnecessary when the private well is dismantled. The Grant was intended to prevent the installation of any future private water supply. The installation of a new private water supply well where a former well was abandoned would be subject to the same local approval that applies for all new private wells. This proposal appears under Option 1 below.*

Option 2: The Department seeks comment on whether a Notice of Activity and Use Limitation (not a Grant) should be required in those instances where a well is removed from service as a drinking water supply (i.e., the property is connected to a public supply), but the property owner maintains the well for other uses such as irrigation (provided such other uses are supported by a risk characterization). The Notice in this instance would inform future property owners that the existing well was found to be unsuitable as a source of drinking water.

Option 1:

40.0932: Identification of Applicable Groundwater Categories

(1) The groundwater categories describe the potential for three different types of exposure. More than one category may apply to a single disposal site. In such cases all applicable categories shall be identified.

...

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(5)

....

(d) Existing Private Wells. Groundwater that is categorized as a Current Drinking Water Source Area solely due to its location within 500 feet of a private water supply well need not be categorized as GW-1 if:

1. the private water supply well is removed from service as a source of drinking water and the following conditions are met:

a. written documentation has been submitted to the Department pursuant to 310 CMR 40.1003 demonstrating that the property(ies) served by the private water supply well has been connected to a public water supply system; and

b. written documentation has been submitted to the Department demonstrating the absence of any unpermitted cross-connection between the private water supply well and public water system or that the private well has been properly abandoned; ~~and~~

~~c. in accordance with 310 CMR 40.1071, a Grant of Environmental Restriction which prohibits the use of the private water supply or the installation of new private water supplies has been approved by the Commissioner and recorded and/or registered; or~~

2. it is demonstrated that there is no hydrogeologic connection between the groundwater and the private water supply well, based on an investigation and evaluation of site-specific conditions, including, but not limited to, as appropriate, the investigation and evaluation of site stratigraphic, potentiometric, and geochemical conditions, and the depth and construction of the private well. The absence of site contaminants in the private well does not, by itself, constitute such a demonstration.

3. the private water supply did not exist at the time of notification pursuant to 310 CMR 40.0300 or was not installed in conformance with applicable laws, by-laws or regulations.

Option 2:

40.0932: Identification of Applicable Groundwater Categories

(1) The groundwater categories describe the potential for three different types of exposure. More than one category may apply to a single disposal site. In such cases all applicable categories shall be identified.

...

(5)

....

(d) Existing Private Wells. Groundwater that is categorized as a Current Drinking Water Source Area solely due to its location within 500 feet of a private water supply well need not be categorized as GW-1 if:

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1. the private water supply well is removed from service as a source of drinking water and the following conditions are met:
 - a. written documentation has been submitted to the Department pursuant to 310 CMR 40.1003 demonstrating that the property(ies) served by the private water supply well has been connected to a public water supply system; and
 - b. written documentation has been submitted to the Department demonstrating the absence of any unpermitted cross-connection between the private water supply well and public water system or that the private well has been properly abandoned; and
 - c. where the private well is maintained for uses other than as a private water supply, documentation is provided in the risk characterization pursuant to 310 CMR 40.0900 demonstrating that such other uses are consistent with a level of No Significant Risk and a Notice of Activity and Use Limitation implemented in accordance with 310 CMR 40.10741, ~~a Grant of Environmental Restriction~~ which ~~prohibits~~ identifies the use of the private ~~water supply well as a drinking water source as a use which is inconsistent with maintaining a level of No Significant Risk or the installation of new private water supplies has been approved by the Commissioner and recorded and/or registered~~; or
2. it is demonstrated that there is no hydrogeologic connection between the groundwater and the private water supply well, based on an investigation and evaluation of site-specific conditions, including, but not limited to, as appropriate, the investigation and evaluation of site stratigraphic, potentiometric, and geochemical conditions, and the depth and construction of the private well. The absence of site contaminants in the private well does not, by itself, constitute such a demonstration.
3. the private water supply did not exist at the time of notification pursuant to 310 CMR 40.0300 or was not installed in conformance with applicable laws, by-laws or regulations.

16. NOTE TO REVIEWERS: *The revisions at 310 CMR 40.0933 correct typographical errors and cross-references.*

40.0933 Identification of Applicable Soil Categories

...

- (5) Category S-1. Soil shall be classified as category S-1 if either:
 - (a) the soil of concern is accessible, pursuant to 310 CMR 40.0933(4)(c)1., and either:
 1. the soil is currently used for growing fruits or vegetables for human consumption, or if it is reasonably foreseeable that the soil may be put to such use; or
 2. a child's frequency or intensity of use is considered to be high pursuant to 310 CMR 40.0933(4)(ab) and (be); or
 3. an adult's frequency and intensity of use are both considered to be high pursuant to 310 CMR 40.0933(4)(ab) and (be); or

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- (b) the soil is potentially accessible, pursuant to 310 CMR 40.0933(4)(c)2., and a child's frequency and intensity of use are both considered to be high pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~).
- (6) Category S-2. Soil shall be classified as category S-2 if either:
- (a) the soil is accessible, pursuant to 310 CMR 40.0933(4)(c)1., and:
1. a child's frequency and intensity of use are both considered to be low pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~); or
 2. children are not present at the disposal site and either (but not both) the adults' frequency or intensity of use is considered to be high, pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~); or
- (b) the soil is potentially accessible, pursuant to 310 CMR 40.0933(4)(c)2., and:
1. either (but not both) a child's frequency or intensity of use is considered to be high pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~); or
 2. children are not present at the disposal site and an adult's frequency and intensity of use are both considered to be high pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~).
- (7) Category S-3. Soil shall be classified as category S-3 if either:
- (a) the soil is accessible, pursuant to 310 CMR 40.0933(4)(c)1., and children are not present at the disposal site and an adult's frequency and intensity of use are both considered to be low pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~); or
- (b) the soil is potentially accessible pursuant to 310 CMR 40.0933(4)(c)2., and:
1. a child's frequency and intensity of use are both considered to be low pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~); or
 2. a demonstration has been made that children are not present at the disposal site, and either an adult's frequency or intensity of use is considered to be low pursuant to 310 CMR 40.0933(4)(~~ab~~) and (~~be~~); or
- (c) the soil is isolated pursuant to 310 CMR 40.0933(4)(c)3., regardless of any receptor's frequency or intensity of use.

ENGINEERED BARRIERS

17. NOTE TO REVIEWERS: *The following changes are proposed to further clarify what financial assurance requirements apply to engineered barriers. The Department is also considering prohibiting the use of engineered barriers at: 1-4 family residential properties when highly toxic hazardous materials are present; and at any disposal site to address chemicals with "lethal effects." Consideration is also being given to requiring the use of a Professional Engineer to sign off on plans for an engineered barrier. Comment is sought on these proposals and the revised language at 310 CMR 40.0996(4) below.*

40.0996: Method 3 Upper Concentration Limits

- (1) Upper Concentration Limits in soil and groundwater are concentrations of oil and/or hazardous material which, if exceeded under the conditions specified below, indicate the potential for significant risk of harm to public welfare and the environment under future conditions. If a condition of No Significant Risk has not been achieved for future conditions but all substantial hazards have been eliminated, then the site may be eligible for a Class C RAO described in 310 CMR 40.1050.

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...

(4) For a disposal site at which the concentration of one or more oil and/or hazardous material in Soil exceeds an Upper Concentration Limit, a level of No Significant Risk of harm to public welfare and to the environment exists or has been achieved for both current and future conditions if a finding of No Significant Risk of harm to public welfare and the environment has been made pursuant to 310 CMR 40.0994 and 40.0995, respectively, an Activity and Use Limitation is implemented as required in 310 CMR 40.1012(2), and the Soil with concentrations exceeding an Upper Concentration Limit:

- (a) has been permanently immobilized or fixated as part of a remedial action;
- (b) is located at a depth greater than 15 feet from the ground surface; or
- (c) is located beneath an engineered barrier. An engineered barrier means a permanent cap with or without a liner that is designed, constructed and maintained in accordance with scientific and engineering standards to achieve a level of no significant risk for any foreseeable period of time. An engineered barrier:
 - 1. shall prevent direct contact with contaminated media;
 - 2. shall control any vapors or dust emanating from contaminated media;
 - 3. shall prevent erosion and any infiltration of precipitation or run-off that could jeopardize the integrity of the barrier or result in the potential mobilization and migration of contaminants;
 - 4. shall be comprised of materials that are resistant to degradation;
 - 5. shall be consistent with the technical standards of RCRA Subpart N, 40 CFR 264.300, 310 CMR 30.600 or equivalent standards;
 - 6. shall include a defining layer that visually identifies the beginning of the barrier;
 - 7. shall be appropriately monitored and maintained to ensure the long-term integrity and performance of the barrier. Plans for the monitoring and maintenance of the barrier shall be submitted to the Department and shall document that one or more financial assurance mechanism(s) detailed in 310 CMR 30.906, have been established and adequately provide for future monitoring, maintenance and any necessary replacement of the barrier; and
 - 8. shall not include an existing building, structure or cover material unless it is designed and constructed to serve as an engineered barrier pursuant to the requirements of 310 CMR 40.0996(4).

(5) Ongoing monitoring to ensure that a condition of No Significant Risk is maintained shall be performed as necessary at any disposal site where a Permanent Solution has been achieved and the concentration of one or more oil and/or hazardous material is greater than the Upper Concentration Limits.

(6) The presence of non-aqueous phase liquids (NAPL) having a thickness equal to or greater than ½ inch in any environmental medium shall be considered a level which exceeds Upper Concentration Limits.

(7) Table 6 lists the Upper Concentration Limits in Groundwater and Soil.

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(8) For any oil or hazardous material not listed at 310 CMR 40.0996(7), either a default or chemical-specific Upper Concentration Limit must be used.

(a) The default Upper Concentration Limit in Groundwater shall be 10,000 µg/L and the default Upper Concentration Limit in Soil shall be 1,000 µg/g.

(b) The chemical-specific Upper Concentration Limits shall be calculated using the methodology presented at 310 CMR 40.0983 and 310 CMR 40.0984.

1. The Upper Concentration Limit in Groundwater shall be equal to ten times the highest groundwater standard calculated at 310 CMR 40.0983 or 100,000 µg/L, whichever is lower.

2. The Upper Concentration Limit in Soil shall be equal to ten times the highest soil standard calculated at 310 CMR 40.0984, or 10,000 µg/g, whichever is lower.

18. NOTE TO REVIEWERS: *The following changes are proposed to make the limitations on the conditions under which an engineered barrier or other cap may be implemented consistent throughout the MCP. The changes proposed at 310 CMR 40.859(4) and 40.1036(4)(e) make these provisions consistent with the language in the Response Action Performance Standard, IRA and RAM provisions at 310 CMR 40.0191(3)(b)., 40.414(7), and 40.442(3), respectively, which require the demonstration of a “lack of a feasible alternative” before an engineered barrier or cap may be used.*

40.0859: Selection of Remedial Action Alternative

...

(4) An engineered barrier, cap or other remedial action alternative which that relies upon on-site disposal, isolation, or containment of oil and/or hazardous material shall not be selected unless and until a Phase III evaluation performed pursuant to the provisions of 310 CMR 40.0850 demonstrates the lack of a feasible alternative. it has been demonstrated through a detailed evaluation using the criteria described in 310 CMR 40.0858 to, on balance, compare favorably to all other alternatives identified by the initial screening in terms of its effectiveness, reliability, degree of risk reduction, timeliness, cost effectiveness and overall benefits.

40.1036: Categories of Class A Response Action Outcomes

...

(4) Class A-4 Response Action Outcomes shall apply to disposal sites where:

(a) a Permanent Solution has been achieved;

(b) the level of oil and hazardous material in the environment has not been reduced to background;

(c) one or more Activity and Use Limitations have been implemented pursuant to 310 CMR 40.1012 to maintain a level of No Significant Risk;

(d) oil and/or hazardous material in soil located at a depth greater than 15 feet from the ground surface or beneath an engineered barrier exceed one or more applicable Upper Concentration Limits in Soil listed at 310 CMR 40.0996(7); and

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(e) an evaluation conducted pursuant to 310 CMR 40.0860 indicates that it is not feasible to reduce the concentrations of oil and hazardous material in soil located at a depth greater than 15 feet from the ground surface or in the area beneath the engineered barrier to less than or equal to the applicable Upper Concentration Limits in Soil listed at 310 CMR 40.0996(7). ~~For a~~As required by 310 CMR 40.0859(4), a Permanent Solution which relies upon an engineered barrier shall not be selected unless and until, a demonstration shall be also provided, as required by 310 CMR 40.0859(4), that Phase III evaluation performed pursuant to the provisions of 310 CMR 40.0850 demonstrates the lack of a feasible alternative. the engineered barrier compares favorably to all other remedial action alternatives.

DATA USABILITY EVALUATION

19. NOTE TO REVIEWERS: *A change is proposed to 310 CMR 40.1056(1) to require that the RAO Statement indicate whether DEP approved analytical methods were used to generate data. DEP anticipates implementing this change by adding it as an item on the RAO transmittal form.*

DEP also proposes to add a provision at 310 CMR 40.1056(2) to require that a Response Action Outcome Statement submittal include a Data Usability evaluation. The intent of this requirement is to ensure that the quality and representativeness of the data used to support an RAO is evaluated and documented. This requirement is a component of the Department's ongoing efforts directed at improving the data used to support decisions under the MCP. These efforts include the August 1, 2003 publication of the Compendium of Analytical Methods. All MCP analytical data submissions made to the Department for samples collected on or after August 1, 2003 are expected to contain the level of support and documentation needed to satisfy the existing regulatory requirements 310 CMR 40.0017 and 40.0191(2)(c), using the tools and guidelines contained in the Compendium of Analytical Methods, or other appropriate and scientifically sound procedures and techniques. The Data Usability assessment, as proposed, would require that LSPs present information relative to the adequacy and the quality of the data used to characterize site conditions and risk and to support a conclusion that a level of No Significant Risk or No Substantial Hazard exists or has been achieved.

40.1056: Content of Response Action Outcome Statements

(1) A Response Action Outcome Statement shall be submitted by a RP, PRP or Other Person on a form established by the Department for such purposes, and shall include, at a minimum, the following:

...

(h) a certification of the Response Action Outcome Statement and all documents submitted with the RAO Statement as required by 310 CMR 40.0009; ~~and~~

(i) indication as to whether oil and/or hazardous material exceed one or more applicable Upper Concentration Limits in Soil or Groundwater, as described at 310 CMR 40.0996; ~~and~~

(j) indication as to whether the analytical data used to support the RAO was generated pursuant to the Department's Compendium of Analytical Methods.

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(2) Except where previously submitted, all documentation, plans and/or reports necessary to support the Response Action Outcome shall be submitted to the Department, including, without limitation, the following:

...

(k) for all Class A, B, or C Response Action Outcomes, a Data Usability assessment documenting that the data relied upon is scientifically valid and defensible, and of a sufficient level of precision, accuracy, representativeness and completeness to support the RAO.

MISCELLANEOUS REVISIONS

The changes to the following sections of the MCP:

- *clarify the intent of the existing regulations;*
- *include substantive changes to improve program operation; and*
- *correct typographical errors including cross references, and other technical corrections.*

20. NOTE TO REVIEWERS: *DEP proposes to clarify at 310 CMR 40.0006 that the discharge of vapors into school buildings and residential dwellings meets the definition of a Condition of Substantial Release Migration if the vapors are being transported via the vadose zone and are impacting these structures.*

40.0006: Terminology, Definitions and Acronyms

Condition of Substantial Release Migration and SRM each mean a condition at a disposal site that includes any of the following:

- (a) releases that have resulted in the discharge of separate-phase oil and/or separate-phase hazardous material to surface waters, subsurface structures, or underground utilities or conduits;
- (b) releases to the ground surface or to the vadose zone that, if not promptly removed or contained, are likely to significantly impact the underlying groundwater, or significantly exacerbate an existing condition of groundwater pollution;
- (c) releases to the groundwater that have migrated or are expected to migrate more than 200 feet per year;
- (d) releases to the groundwater that have been or are within one year likely to be detected in a public or private water supply well;
- (e) releases to the groundwater that have been or are within one year likely to be detected in a surface water body, wetland, or public water supply reservoir; or
- (f) releases to the groundwater or to the vadose zone that have resulted or are within one year likely to result in the discharge of vapors into school buildings or occupied residential dwellings.

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21. NOTE TO REVIEWERS: *DEP proposes to clarify at 310 CMR 40.0006 that the term Substantial Release Migration is synonymous with Condition of Substantial Release Migration.*

40.0006: Terminology, Definitions, and Acronyms

...

Substantial Release Migration and SRM (see Condition of Substantial Release Migration)

22. NOTE TO REVIEWERS: *DEP proposes to clarify at 310 CMR 40.0006 via a new definition of Pilot Test when a pilot test is assessment versus remediation.*

40.0006: Terminology, Definitions, and Acronyms

...

Pilot Test means a test designed to acquire information on the anticipated performance of a remedial system. A pilot test shall be considered assessment if it is conducted for a duration of no more than seven consecutive days and involves only soil vapor and/or groundwater extraction, otherwise it shall be considered remediation.

23. NOTE TO REVIEWERS: *DEP proposes to revise the definition of Volatile Organic Compound to update the reference to the most current EPA method.*

Volatile Organic Compounds and VOCs each mean an organic compound with a boiling point less than 200 degrees Celsius that are targeted analytes in EPA Method 8240~~60~~ and other purgeable organic methods specified in EPA publication SW-846 entitled, "Test Methods for Evaluating Solid Waste."

24. NOTE TO REVIEWERS: *DEP proposes to revise 310 CMR 40.0007, 40.0427, and 40.0446 to clarify DEP's authority to refuse to accept or require modification of any submittal required by the MCP if it determines that it does not meet the applicable requirements of the MCP. The provision is not intended to invoke the audit provisions or issuance of c. 21E, §9 orders.*

40.0007: Rules of Construction

- (1) 310 CMR 40.0000 shall be construed to effectuate the purposes of M.G.L. c. 21E and this Contingency Plan.
- (2) As used in 310 CMR 40.0000, words in the singular also include the plural.
- (3) No provision of 310 CMR 40.0000 shall be construed to relieve any person from any obligation for Response Action Costs or damages related to a site or disposal site for which that person is liable under M.G.L. c. 21E or from any

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obligation for any administrative, civil or criminal penalty, fine, settlement, or other damages.

(4) No provision of 310 CMR 40.0000 shall be construed to limit the Department's authority to take or arrange for, or to require any person to perform, any response action authorized by M.G.L. c. 21E which the Department deems necessary to protect health, safety, public welfare or the environment.

(5) No provision of 310 CMR 40.0000 shall be construed to limit the Department's authority to reject or require modification of any submittal required by M.G.L. c. 21E, 310 CMR 40.0000, or any other permit, order, or determination issued thereunder if it determines that the submittal does not meet the requirements of the same.

~~(56)~~ No provision of 310 CMR 40.0000 shall be construed to imply authorization by the Department to any person other than the Department, or the Department's employees, agents or contractors, to enter any real or personal property not owned by him or her to carry out a response action, or otherwise injure or interfere with any other person's rights or interests in real or personal property, without that person's consent.

~~(67)~~ The provisions of 310 CMR 40.0000 are severable and if any provision or its application to any person or circumstance is held invalid, its invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

~~(78)~~ No provision of 310 CMR 40.0000 shall be construed to relieve any person of the necessity of complying with all other applicable federal, state or local laws.

~~(89)~~ No provision of 310 CMR 40.0000 shall be construed to create in any private party a right to publicly funded response or enforcement action or to create any duty of the Department to perform any response action at any particular time.

40.0427: Immediate Response Action Completion Reports

...

(8) Unless otherwise directed by the Department, Immediate Response Action Completion Reports shall not require approval from the Department, ~~but shall be subject to auditing by the Department, as described in 310 CMR 40.1100.~~

40.0446: Release Abatement Measure Completion Report

...

(8) Unless otherwise directed by the Department, Release Abatement Measure Completion Reports are not subject to approval by the Department, ~~but shall be subject to auditing by the Department, as set forth in 310 CMR 40.1100.~~

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25. NOTE TO REVIEWERS: *DEP proposes to revise 310 CMR 40.0008(4)(d) to clarify that the intent of this provision is to allow for a 7-day grace period for electronic submittals and a 14-day grace period for the follow-up written materials to be received in the appropriate regional office. In other words, if the electronic submission is made within 7 days after the actual deadline date, and the written materials associated with the electronic submittal are delivered to the appropriate DEP office within 14 days after the actual deadline date, the submittal will be deemed received by the due date.*

26. *DEP also seeks comment as to whether the regulations should be revised to eliminate grace periods for submittal, regardless of how the submittal is sent. Removing the grace period will further encourage the use of electronic submittals.*

40.0008: Computation of Time Periods and Deadlines

...

(4) Determining Date of Receipt of Document Submitted to the Department. Except as provided by 310 CMR 40.0008(5), each document required by, or submitted pursuant to, 310 CMR 40.0000 shall be deemed received by the Department as follows:

...

(d) if given by electronic transmission, where the Department provides for submitting the document by such means, the document shall be deemed to be received on the date the transmission is delivered to the Department, provided, however, that if the date of the transmission is within seven days of the date the submittal is due and the date when that a printed copy of the document is submitted delivered to the appropriate office of the Department (i.e. the date stamped received) is within fourteen days of the date the submittal is due, the submittal shall be deemed to have been received by the due date; ~~if the printed copy of the document is not received by the appropriate office of the Department within 14 days of the date the submittal is due, then the document will be considered received on the date the printed copy is received.~~ In no case shall the printed copy be submitted to the Department more than 14 days after the date the electronic transmission is delivered to the Department.

27. NOTE TO REVIEWERS: *DEP proposes to clarify at 310 CMR 40.0015 that a Conceptual Scope of Work submitted pursuant to 310 CMR 40.0510 is subject to the provisions for an LSP Opinion. In addition, DEP proposes to amend 40.0015(4) to clarify that an LSP Opinion shall be considered a representation by the LSP that the response actions that are the subject of the opinion are performed in compliance with the MCP and any DEP permits or approvals.*

40.0015: Content of Waste Site Cleanup Activity Opinions

(3) The submittals required by 310 CMR 40.0000, which are LSP Opinions, include, but are not limited to, the following:

...

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(c) any Phase Report submitted pursuant to 310 CMR 40.0000, including, but not limited to:

1. any ~~Scope of Work submitted pursuant to 310 CMR 40.0510(2)(f) or Phase II Scope of Work submitted pursuant to~~ 310 CMR 40.0834;
2. any Phase II Report submitted pursuant to 310 CMR 40.0835;
3. any Remedial Action Plan submitted pursuant to 310 CMR 40.0861;
4. any Notice of Commencement of Work submitted pursuant to 310 CMR 40.0870;
5. any Remedy Implementation Plan submitted pursuant to 310 CMR 40.0874;
6. any Final Inspection Report submitted pursuant to 310 CMR 40.0878;
7. any Phase V Inspection and Monitoring Report submitted pursuant to 310 CMR 40.0892;
8. any As-Built Construction Report submitted pursuant to 310 CMR 40.0875;

...

(4) No provision in the MCP is intended to render an LSP Opinion a warranty or guaranty; provided, however, that an Opinion shall be considered a representation:

- (a) that the Professional Services associated therewith were provided in accordance with the applicable standards of care;
- (b) that the response action(s) which is (are) the subject of the Opinion was (were) performed in accordance with the applicable provisions of M.G.L. c. 21E ~~and the MCP, 310 CMR 40.0000, and any DEP order(s), permit(s) or approval(s);~~ and
- (c) that the conclusion(s) expressed therein is (are) based upon the rendering LSP's professional judgment and reflect his or her knowledge, information and belief.

(5) Any rider annexed to an LSP Opinion concerning professional liability exposure shall be deemed void by the Department for enforcement purposes to the extent that it is inconsistent with 310 CMR 40.0009(4) or otherwise serves to compromise or diminish the content or meaning of the Opinion for the Department's purposes under M.G.L. c. 21E and/or the MCP. The Department's receipt, acceptance or approval of any document which contains such a rider, shall not be construed to imply Department approval or endorsement of the liability management mechanism or practice contained therein or the content thereof.

...

28. NOTE TO REVIEWERS: *DEP proposes delete the Pittsfield Pilot project provisions at 310 CMR 40.0027 as they are no longer applicable.*

~~40.0027: Pittsfield Pilot~~

~~(1) Purpose. The purpose of 310 CMR 40.0027 is to establish rules for a Pilot Project to implement one or more temporary solutions for long term use at eligible sites in the City of Pittsfield to promote the reuse, redevelopment, and economic~~

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~~growth of such sites pursuant to the Berkshire Economic Development Authority Act, St. 1996, c. 295, § 23.~~

~~(2) Definitions. The following term applies to 310 CMR 40.0027:~~

~~(a) Plan means the specific description of the long term temporary solution(s) to be implemented at an applicable site subject to the Pilot Project which is prepared by the Department of Environmental Protection.~~

~~(3) Applicable Sites.~~

~~(a) This Pilot Project applies only to:~~

- ~~1. industrial portions of disposal sites in the City of Pittsfield;~~
- ~~2. that are greater than 100 contiguous acres in size;~~
- ~~3. that are owned by a single owner as of August 9, 1996;~~
- ~~4. for which notification of a release of oil and/or hazardous material has been provided pursuant to M.G.L. chapter 21E and 42 U.S.C. 6901 *et seq* as of August 9, 1996; and~~
- ~~5. where existing zoning only allows for industrial uses.~~

~~(b) This Pilot Project shall not apply to any rivers, streams, or other surface waters and the banks thereof.~~

~~(4) General Requirements for the Pilot Project. In order for the Pilot Project to apply, the following requirements shall be met:~~

~~(a) Timeframe. One or more long term temporary solutions shall be implemented by August 9, 2001 in accordance with the requirements of 310 CMR 40.0027 and the Plan prepared by the Department of Environmental Protection. The timeframe for implementing the pilot may be extended upon approval from the Department;~~

~~(b) Participation. The Pilot Project requires the active participation of a prospective owner or owners, or a lessee or lessees, with site use plans which will result in the creation of a substantial number of new jobs;~~

~~(c) Performance Standard. The long term temporary solution(s) implemented at the disposal site(s) subject to the Pilot Project shall be consistent with the requirements and standards as described in the Plan and shall ensure the protection of health, safety, public welfare and the environment;~~

~~(d) Change in Party Conducting Response Actions. Should the owner or lessee of a property subject to the Pilot Project sell the property or transfer a leasehold interest in the property, responsibility for conducting necessary response actions to implement or maintain one or more long term temporary solutions at the subject property pursuant to 310 CMR 40.0027 and the Plan may be transferred to the new owner or leaseholder upon approval from the Department. The following information and assurances satisfactory to the Department shall be provided to the Department by any person seeking approval of the proposed transfer:~~

- ~~1. written consent by the transferee to the terms and conditions of the pilot project and the Plan;~~
- ~~2. a demonstration by the transferee of ability and willingness to conduct the response actions necessary to implement or maintain one or more long term temporary solutions, including provision of financial assurance for the performance of the work;~~

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- ~~3. the transferee's relevant history of compliance with M.G.L. c. 21E and 310 CMR 40.0000 and other state, federal and local laws for the protection of health, safety, public welfare and the environment; and~~
- ~~4. a statement as to why the transfer is sought.~~

~~(e) Public Involvement. Opportunity for public involvement shall be provided according to 310 CMR 40.1400.~~

~~(5) Effect of Pilot Project. Compliance with the provisions of 310 CMR 40.0027 and the Plan shall be deemed to satisfy the remediation requirements of MGL c. 21E, § 3A and of 310 CMR 40.0000 when the Department issues a written determination of compliance.~~

~~(6) Termination of Pilot Project.~~

~~(a) A disposal site which is being remediated pursuant to the Pilot Project shall continue to be covered by the terms of the Pilot Project unless and until:~~

- ~~1. the Department of Environmental Protection determines that the party performing response actions under the Pilot Project is not implementing or maintaining one or more long term temporary solutions in compliance with the Plan or the requirements of 310 CMR 40.0027; and~~
- ~~2. after notice by the Department, said party fails to correct violations within the timeframe specified in the notice.~~

~~(b) Failure to correct a violation within the specified timeframe will result in the termination of the Pilot Project, and the disposal site(s) will become subject to the all otherwise applicable requirements of M.G.L. c. 21E and 310 CMR 40.0000.~~

29. NOTE TO REVIEWER: *DEP proposes to clarify at 310 CMR 40.0032 that Remediation Waste must be removed from a disposal site within 120 days of excavation (or 90 days if hazardous waste), and that the options for transporting are a Bill of Lading or a Hazardous Waste Manifest.*

40.0030: Management Procedures for Remediation Waste

The provisions of 310 CMR 40.0031 through 40.0039, cited collectively as 310 CMR 40.0030, establish requirements and procedures for the management of Remediation Waste.

40.0031: General Provisions for the Management of Remediation Waste

(1) RPs, PRPs, and Other Persons undertaking response actions shall manage Remediation Waste in a manner that ensures the protection of health, safety, public welfare and the environment, and shall handle, store, transport, treat, recycle, reuse, dispose, or discharge Remediation Waste in compliance with the provisions of 310 CMR 40.0030 and all other applicable federal, state, and local laws, regulations, and bylaws.

(2) RPs, PRPs, and Other Persons conducting response actions shall consign, convey and/or transport Remediation Waste only to facilities and locations licensed, permitted, or approved to accept such materials by appropriate federal, state or local authorities.

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(3) Response actions involving Remediation Waste which are conducted within the boundaries of a disposal site in compliance with the provisions of 310 CMR 40.0000 shall be considered, for the purposes of 310 CMR 30.801(11), remedial actions initiated by the Department under the provisions of M.G.L. c. 21E, except for those response actions involving Uncontainerized Hazardous Waste for which the Department has made a determination, pursuant to 310 CMR 40.0033(5), to require compliance with all or part of 310 CMR 30.000. Otherwise, a valid license issued pursuant to M.G.L. c. 21C and 310 CMR 30.000 shall not be required to manage Remediation Waste within the boundaries of a disposal site, provided such Remediation Waste is managed in compliance with M.G.L. c. 21E and 310 CMR 40.0000.

(4) Response actions involving soil, groundwater, and Remediation Waste which are conducted in compliance with the provisions of 310 CMR 40.0032(3), 40.0034, and 40.0045(6) are deemed to be response actions conducted in compliance with the approval provisions of M.G.L. c. 21E for the purposes of 310 CMR 30.252(2).

(5) Remediation Waste which meet the criteria defining a listed hazardous waste or which are themselves a characteristic hazardous waste shall be accumulated, treated, and stored or otherwise managed at a disposal site in a manner that achieves a level of control and protection equivalent to that provided by the technical and management requirements of 310 CMR 30.000, the "Massachusetts Hazardous Waste Regulations."

(6) Remediation Waste, Containerized Waste, and Uncontainerized Waste which meet the criteria defining a listed or characteristic hazardous waste shall, when transported from a disposal site, comply with the requirements of 310 CMR 30.000.

(7) All remediation waste shall be removed from the site of excavation or collection:

(a) within 120 days of its initial excavation or collection if such remediation waste is being managed in accordance with 310 CMR 40.0030, unless otherwise provided in 310CMR 40.0034; or

(b) within 90 days of its initial excavation or collection if such remediation waste meets the criteria defining a listed or characteristic hazardous waste and is being managed in accordance with 310 CMR 30.000.

40.0032: Contaminated Media and Contaminated Debris

(1) Contaminated Media and Contaminated Debris containing oil and/or waste oil at levels equal to or greater than a release notification threshold specified in 310 CMR 40.0300 and 40.1600, and that are not otherwise a hazardous waste, shall be managed in compliance with the provisions of 310 CMR 30.252(1) or, in accordance with the provisions of 310 CMR 30.252(2) shall be managed under the Bill of Lading process described in 310 CMR 40.0034 or under a Hazardous Waste Manifest in accordance with 310 CMR 30.000, when they are transported from a disposal site.

(2) Contaminated Media and Contaminated Debris containing one or more hazardous materials at levels equal to or greater than a release notification

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threshold specified in 310 CMR 40.0300 and 40.1600, and which are not a hazardous waste, shall be managed under the Bill of Lading process described in 310 CMR 40.0034 or under a Hazardous Waste Manifest in accordance with 310 CMR 30.000 when they are transported from a disposal site.

(3) Soils containing oil or waste oil at concentrations less than a release notification threshold specified in 310 CMR 40.0300 and 40.1600, and that are not otherwise a hazardous waste, and soils that contain one or more hazardous materials at concentrations less than a release notification threshold, and that are not a hazardous waste, may be transported from a disposal site without notice to or approval from the Department under the provisions of this Contingency Plan, provided that such soils:

- (a) are not disposed or reused at locations where the concentrations of oil or hazardous materials in the soil would be in excess of a release notification threshold applicable at the receiving site, as delineated in 310 CMR 40.0300 and 40.1600; and
- (b) are not disposed or reused at locations where existing concentrations of oil and/or hazardous material at the receiving site are significantly lower than the levels of those oil and/or hazardous materials present in the soil being disposed or reused.

(4) Contaminated Groundwater and Contaminated Surface Water that is collected, treated, conveyed, withdrawn, contained or discharged at or from a disposal site as part of a response action shall be managed in compliance with applicable provisions of 310 CMR 40.0030 and 40.0040.

(5) Contaminated Media and Contaminated Debris managed under the Bill of Lading process described in 310 CMR 40.0034 shall not be disposed of at a land disposal facility if a feasible alternative exists that involves the reuse, recycling, destruction, and/or detoxification of such materials. An evaluation of whether such an alternative is feasible shall consider:

- (a) the volume and physical characteristics of the Contaminated Media and Debris;
- (b) the levels of oil and/or hazardous materials present within the Contaminated Media and Debris; and
- (c) the relative costs of management options.

30. NOTE TO REVIEWERS: *DEP proposes to correct a typographical error at 310 CMR 40.0040*

40.0040: Management Procedures for Remedial Wastewater and Remedial Additives

The provisions of 310 CMR 40.0041 through 40.004~~7~~⁸, cited collectively as 310 CMR 40.0040, establish requirements and procedures for the management of Remedial Wastewater and/or Remedial Additives, and for the construction, installation, modification, operation and maintenance of treatment works for the management of Remedial Wastewater and/or Remedial Additives.

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PROPOSED REVISIONS TO SUBPART B: ORGANIZATION AND RESPONSIBILITIES

31. NOTE TO REVIEWERS: *DEP proposes to revise the adequately regulated provisions of 310 CMR 40.0112 Federal Corrective Action Pursuant to HSWA, 310 CMR 40.0113 RCRA Authorized State Hazardous Waste Program (M.G.L. c. 21C and 310 CMR 30.000), and 310 CMR 40.0114 Solid Waste Management Facilities to reflect the original intent of the language with regards to Conditions of Substantial Release Migration at adequately regulated sites. The current language contains cross-references to section 310 CMR 40.0413 Substantial Release Migration that were deleted in October, 1999 and superseded by the definition of Condition of Substantial Release Migration in 310 CMR 40.0006. In addition, DEP proposes to revise 310 CMR 40.0113 and 310 CMR 40.0114 to provide that after notification has been made pursuant to 310 CMR 40.0300, DEP may allow Immediate Response Actions to be conducted in accordance with an approval, permit, or order under 310 CMR 30.000 or 310 CMR 19.00.*

40.0112: Federal Corrective Action Pursuant to HSWA

(1) General. HSWA Corrective Actions performed by persons other than the Department shall be deemed adequately regulated for purposes of 310 CMR 40.0000, provided the person undertaking such response actions does so in compliance with the terms and conditions of the applicable license, permit, approval or order issued pursuant to 42 U.S.C. §§ 6928(a), 6928(h), 6924(u) or 6924(v) and the following:

...

(d) the requirements and procedures in 310 CMR 40.0405 through 40.0429 applicable to Immediate Response Actions, except:

1. with respect to Conditions of Substantial Release Migration: with respect to conditions of substantial release migration, 310 CMR 40.0413;

(a) releases to the ground surface or to the vadose zone that, if not promptly removed or contained, are likely to significantly impact the underlying groundwater, or significantly exacerbate an existing condition of groundwater pollution;

(b) releases to the groundwater that have migrated or are expected to migrate more than 200 feet per year; or

(c) releases to the groundwater that have been or are within one year likely to be detected in a surface water body, wetland, or public water supply reservoir.

2. requirements for approval of the Department set forth in 310 CMR 40.0420, if EPA has approved the response actions;

...

40.0113: RCRA Authorized State Hazardous Waste Program (M.G.L. c. 21C and 310 CMR 30.000)

(1) General. Response actions at 21C Facilities performed by persons other than the Department and permitted, approved or ordered by the Department pursuant to M.G.L. c. 21C and/or 310 CMR 30.000 shall be deemed adequately regulated for purposes of 310 CMR 40.0000, provided the person undertaking such response actions does so in compliance with the terms and conditions of any such permit, order or approval and the following:

...

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(d) the requirements and procedures in 310 CMR 40.0405 through 40.0429 applicable to Immediate Response Actions, except: ~~with respect to conditions of unacceptable release migration, 310 CMR 40.0414~~ for the following Conditions of Substantial Release Migration:

1. releases to the ground surface or to the vadose zone that, if not promptly removed or contained, are likely to significantly impact the underlying groundwater, or significantly exacerbate an existing condition of groundwater pollution;
2. releases to the groundwater that have migrated or are expected to migrate more than 200 feet per year; or
3. releases to the groundwater that have been or are within one year likely to be detected in a surface water body, wetland, or public water supply reservoir, that the Department may determine after notification in accordance with 310 CMR 40.0300 by the person conducting response action(s) at the disposal site that the additional response actions under 310 CMR 40.0400 shall be conducted under an order, permit or approval under M.G.L. c. 21C and 310 CMR 30.000.

...

40.0114: Solid Waste Management Facilities

(1) General. Response actions performed by persons other than the Department at Solid Waste Management Facilities permitted, approved or ordered by the Department pursuant to M.G.L. c. 21H, M.G.L. c. 111, § 150A and/or 310 CMR 19.000 shall be deemed adequately regulated for purposes of 310 CMR 40.0000, provided the person undertaking such response actions does so in compliance with the terms and conditions of any such permit, order or approval and the following:

...

(d) the requirements and procedures in 310 CMR 40.0405 through 40.0429 applicable to Immediate Response Actions, except: with respect to the following e~~Conditions of Substantial Release Migration, 310 CMR 40.0413;~~

1. releases to the ground surface or to the vadose zone that, if not promptly removed or contained, are likely to significantly impact the underlying groundwater, or significantly exacerbate an existing condition of groundwater pollution;
2. releases to the groundwater that have migrated or are expected to migrate more than 200 feet per year; or
3. releases to the groundwater that have been or are within one year likely to be detected in a surface water body, wetland, or public water supply reservoir, that the Department may determine after notification by the person conducting response action(s) at the disposal site in accordance 310 CMR 40.0300 that the additional response actions under 310 CMR 40.0400 shall be conducted under an order, permit or approval issued under 310 CMR 19.000.

32. NOTE TO REVIEWERS: *DEP proposes to revise 310 CMR 40.0167 to clarify that whenever DEP establishes an Interim Deadlines, such deadline will be established in writing and that the document in which such deadline is set forth is not limited to the list provided in 40.1067(3). The reference to settlement discussions has been deleted because it is already addressed in 40.0167(1).*

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40.0167: Interim Deadlines

(1) The Department may establish and enforce reasonable Interim Deadlines consistent with M.G.L. c. 21E and 310 CMR 40.0000 for the performance of response actions, and the furnishing of information and provision of access to documents and other information to DEP, including, but not limited to, deadlines for compliance with Requests for Information, applicable orders, permits and other requirements, and deadlines for the termination of settlement discussions.

(2) Any person who is required to comply with an Interim Deadline may request, in writing, an extension thereof prior to the running of any such deadline. Each such request shall state clearly and concisely the facts which are grounds for the extension and the relief sought. The Department may modify an Interim Deadline if it deems such action appropriate. Any such modification shall be made in writing.

(3) The Department ~~may shall~~ establish ~~one or more~~ Interim Deadlines in writing by means of, but not limited to, the following:

- (a) an approval of an application or work schedule;
- (b) the issuance of a permit, Request for Information, Notice of Responsibility or Notice of Response Action; or
- (c) the issuance of an order pursuant to M.G.L. c. 21E, §§ 9 or 10. ~~The Department may also establish an Interim Deadline for the termination of settlement discussion by letter or other written correspondence.~~

(4) The Department's decision to establish, modify or refuse to modify one or more Interim Deadlines in accordance with 310 CMR 40.0167 shall not be subject to M.G.L. c. 30A, or any other law, governing adjudicatory proceedings.

(5) If the person required to comply with an Interim Deadline does not make a timely application for an extension thereof in accordance with 310 CMR 40.0167(2), the Interim Deadline shall be presumed to constitute a reasonable Interim Deadline consistent with M.G.L. c. 21E and 310 CMR 40.0000. Such presumption may be rebutted by a preponderance of the evidence.

33. NOTE TO REVIEWERS: *The following revisions correct typographical errors and cross-references at 310 CMR 40.0172.*

40.0172: Technical, Financial and Legal Inabilities

...

(3) Upon obtaining reason to believe that one or more response actions are beyond his or her financial ability to perform, an RP or PRP shall undertake, to the extent that he or she has sufficient assets available, reasonable steps to:

...

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(c) implement Immediate Response Actions to abate or prevent Imminent Hazards and/or to address a Condition of Substantial Release Migration.

34. NOTE TO REVIEWERS: *DEP proposes to clarify at 310 CMR 40.0191 that dilution of contaminated media is not a preferred and/or allowed remedial option.*

40.0191: Response Action Performance Standard (RAPS)

(1) The Response Action Performance Standard (RAPS) is the level of diligence
...

(3) The application of RAPS shall be protective of health, safety, public welfare and the environment and shall include, without limitation, in the context of meeting the requirements of this Contingency Plan, consideration of the following:

(a) technologies which reuse, recycle, destroy, detoxify or treat oil and/or hazardous materials, where feasible, to minimize the need for long-term management of contamination at or from a disposal site;

(b) containment measures as feasible Permanent Solutions only where reuse, recycling, destruction, detoxification and treatment are not feasible;

(c) remedial actions to reduce the overall mass and volume of oil and/or hazardous material at a disposal site to the extent feasible, regardless of whether it is feasible to achieve one or more Temporary Solutions and/or Permanent Solutions or whether it is feasible to achieve background for the entire disposal site, and shall not include the dilution of contaminated media with uncontaminated media; and

(d) response actions to restore groundwater, where feasible, to the applicable standards of quality within a reasonable period of time to protect the existing and potential uses of such resources.

PROPOSED REVISIONS TO SUBPART D: PRELIMINARY RESPONSE ACTIONS AND RISK REDUCTION MEASURES

35. NOTE TO REVIEWERS: *DEP proposes to revise 40.0446(3) to delete references to DEP approvals for RAMs. This change was intended to be included in June 2003 revisions.*

40.0446: Release Abatement Measure Completion Report

...

(3) Unless otherwise specified by the Department, aA Release Abatement Measure Completion Report shall not be required for sites where a Response Action Outcome Statement, as described in 310 CMR 40.1000, is submitted to the Department within 120 days ~~of obtaining oral, written, or presumed approval from the Department to conduct the Release Abatement Measure, whichever occurred sooner from the date a complete Release Abatement Measure Plan is received by the Department.~~

PROPOSED REVISIONS TO SUBPART G: TIER I PERMITS

36. NOTE TO REVIEWERS: *DEP proposes to revise 40.0750(1) to correct cross-referencing errors.*

40.0750: Tier I Permit Effective Date

(1) A Tier I Permit shall become effective:

...

40.07~~25~~0 : continued

(d) on the date the Department issues its written approval of the Permit, if the applicant and the Department by written agreement extend any schedule for timely action or individual portion thereof for the review of a Tier I Permit application pursuant to 310 CMR 40.0720(~~67~~) or 310 CMR 4.00.

PROPOSED REVISIONS TO SUBPART J: RESPONSE ACTION OUTCOMES

40.1036: Categories of Class A Response Action Outcomes

...

(6) Class A-1, A-2, A-3 and A-4 Response Action Outcomes may be achieved:

...

(d) after completion of Post-Class C RAO ~~o~~Operation, ~~m~~Maintenance and/or ~~m~~Monitoring pursuant to 310 CMR 40.089~~76~~.

...

37. NOTE TO REVIEWERS: *The revision at 310 CMR 40.1071(2)(c)2. deletes a redundant phrase.*

40.1071: Grants of Environmental Restrictions for Disposal Sites Where a RP, PRP Or Other Person Conducts Response Actions

(2) Contents of A Grant of Environmental Restriction A Grant of Environmental Restriction shall contain the following information:

... (c) if a person(s) signing the Grant of Environmental Restriction is not an individual signing on his/her own behalf, but rather on behalf of an entity (LLC, LLP, limited partnership, etc.), or as trustee, executor, or attorney in fact, documentation shall be submitted as an exhibit to the Grant of Environmental Restriction verifying that the person(s) signing the grant is authorized to do so. If the property owner is a corporation, such documentation shall consist of:

1. a certified Registry copy of a Clerk's Certificate of Incumbency from the clerk of the corporation certifying that the officer(s) signing the Grant of

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Environmental Restriction on behalf of the corporation held his or her office as of the date of the Grant of Environmental Restriction; and

2. unless the corporate officer(s) signing the Grant of Environmental Restriction holds the office of both president or vice president and treasurer or assistant treasurer, a certified Registry copy of a Clerk's Certificate from the clerk or secretary of the corporation certifying a corporate vote, resolution, or by-law ~~granting the officer(s)~~ authorizing the officer(s) to do so; |

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38. NOTE TO REVIEWERS: *DEP proposes to eliminate Form 1072C at 310 CMR 40.1099 and references to the same at 310 CMR 40.1071, a result of the proposed revision at 310 CMR 40.0932 that would eliminate the requirement to implement a Grant of Environmental Restriction when a private well is abandoned. (See also Note to Reviewers #15.)*

40.1071: Grants of Environmental Restrictions for Disposal Sites Where a RP, PRP Or Other Person Conducts Response Actions

- (1) General Requirements At any disposal site or portion of a disposal site where a RP, PRP or Other Person is conducting a response action(s) for which a Grant of Environmental Restriction has been selected as a form of Activity and Use Limitation pursuant to 310 CMR 40.1070, the following requirements shall be met:
- (a) the Grant of Environmental Restriction shall be prepared using Form 1072A ~~or Form 1072C~~ set forth in 310 CMR 40.1099;
 - (b) an Activity and Use Limitation Opinion from a Licensed Site Professional shall be submitted on a form prescribed by the Department with each Grant of Environmental Restriction as an exhibit of the Restriction and shall specify:
 - 1. why the Grant of Environmental Restriction is appropriate to:
 - a. achieve and/or maintain a level of No Significant Risk for a Class A or B Res-ponse Action Outcome; or
 - b. eliminate a substantial hazard for a Class C Response Action Outcome.
 - 2. Site Activities and Uses to be prohibited and/or restricted;
 - 3. Site Activities and Uses to be permitted; and
 - 4. obligations and conditions necessary to meet the objectives of the Grant of Environmental Restriction;
 - (c) the Grant of Environmental Restriction shall be submitted to the Department for the Commissioner's signature with the applicable fee pursuant to 310 CMR 4.00; and
 - (d) the Grant of Environmental Restriction, signed by the Commissioner, shall be recorded and/or registered as specified in 310 CMR 40.1071(3). Acceptance of any such Restriction shall not be construed or deemed to imply Department approval of the adequacy of any response actions performed at the disposal site.

~~Form 1072C~~

~~_____ GRANT OF ENVIRONMENTAL RESTRICTION
_____ FOR CLOSED PRIVATE DRINKING WATER WELL(S)
_____ M.G.L. c. 21E, § 6 and 310 CMR 40.0000~~

~~WHEREAS, _____, is the owner(s) in fee simple of that [those]
certain parcel(s) of [vacant] land located in _____ (Town/City), _____
County, Massachusetts [with the buildings and improvements thereon], pursuant to [a deed
recorded with the _____ County Registry of Deeds in Book _____, Page _____];~~

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~~[source of title other than by deed]; and/or [Certificate of Title No. _____ issued by the Land Registration Office of the _____ County Registry District];~~

~~WHEREAS, said parcel(s) of land is more particularly bounded and described in Exhibit A, attached hereto and made a part hereof ("Property"). This parcel(s) is shown on [a plan recorded in the _____ County Registry of Deeds in Plan Book _____, Plan _____], and/or on [Land Court Plan No. _____];~~

~~WHEREAS, there is a disposal site within 500 feet of the Property at which there has been a release of oil and/or hazardous material. Said disposal site has DEP Site Name _____ and DEP Release Tracking No.(s) _____, and is located in _____ (Town/City), _____ County, Massachusetts. Said disposal site is more particularly bounded and described in Exhibit B, attached hereto and made a part hereof ("Disposal Site");~~

~~WHEREAS, the Property is not part of the Disposal Site;~~

~~WHEREAS, there is located within the Property a private drinking water supply well;~~

~~WHEREAS, a response action has been selected for the [Disposal Site][Portion of the Disposal Site] pursuant to 310 CMR 40.0932(5)(d), as set forth in the Activity and Use Limitation Opinion ("AUL Opinion") dated _____, which is attached hereto as Exhibit C and made a part hereof. Said response action requires the following:~~

~~(i) the connection of the Property to a public drinking water supply system;~~

~~(ii) the abandonment of the private drinking water supply well(s) located within the Property; and~~

~~(iii) the implementation of a Grant of Environmental Restriction in accordance with 310 CMR 40.1070, prohibiting use of the Property's private drinking water supply and installation of new private drinking water supplies within the Property;~~

~~WHEREAS, the Property is connected to a public drinking water supply system as is confirmed in the attached AUL Opinion;~~

~~WHEREAS, the private drinking water supply well(s) located within the Property is closed and abandoned in accordance with applicable well closure regulations as is confirmed in the attached AUL Opinion (Exhibit C); and~~

~~WHEREAS, no unpermitted cross-connection exists between the private drinking water supply well(s) located within the Property and the public drinking water supply system as is confirmed in the attached AUL Opinion;~~

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~~NOW, THEREFORE, in accordance with the provisions of M.G.L. c. 21E, § 6 and 310 CMR 40.0000, I, _____, of _____ (Town/City), _____ County, _____ (State) ("Grantor"), do hereby GRANT to the DEPARTMENT OF ENVIRONMENTAL PROTECTION, an agency established under the laws of the Commonwealth of Massachusetts, having its principal office at One Winter Street, Boston, Massachusetts 02108 ("DEP"), as a gift, with QUITCLAIM COVENANTS, an ENVIRONMENTAL RESTRICTION ("Restriction") in, on, through, over and under the Property.~~

~~Said Restriction is subject to the following terms and conditions:~~

~~1. Restricted Activities. Grantor shall not perform, suffer, allow or cause any person to perform any of the following activities in, on, through, over or under the Property;~~

~~(i) use of the Property's private drinking water supply;~~

~~(ii) installation of new private drinking water supplies within the Property; and~~

~~(iii) removal of the sealant used in closing the private drinking water supply well(s) located within the Property;~~

~~2. Permitted Activities. Grantor expressly reserves the right to perform, suffer, allow or cause any person to perform any activities in, on, through, over or under the Property other than those certain activities restricted under Paragraph 1, including, but not limited to:~~

~~[(i) use of the Property's private water supply well for irrigation purposes;]~~

~~[(ii) use of the Property's private water supply well for industrial or commercial purposes; and]~~

~~[(iii) _____].~~

~~3. Obligations and Conditions. Grantor affirmatively agrees to maintain the private drinking water supply well located within the Property in its closed and abandoned condition;~~

~~4. Easements. In establishing this Restriction, Grantor hereby grants the following easements for the term of this Restriction to DEP, its agents, contractors, subcontractors and employees:~~

~~(i) an easement to pass and repass over the Property for purposes of inspecting the Property to insure compliance with and fulfillment of the terms of this Grant; and~~

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~~(ii) an easement in, on, through, over and under the Property for purposes of conducting inspections and subsurface investigations in order to confirm compliance with the terms of this Restriction;~~

~~5. Severability. Grantor hereby agrees, in the event that a court or other tribunal determined that any provision of this instrument is invalid or unenforceable that:~~

~~(i) Any such provision shall be deemed automatically modified to conform to the requirements for validity and enforceability as determined by such court or tribunal; and/or~~

~~(ii) Any such provision that, by its nature, cannot be so modified, shall be deemed deleted from this instrument as though it had never been included.~~

~~6. Enforcement. Grantor expressly acknowledges that a violation of the terms of this instrument could result in the following:~~

~~(i) in the assessment of penalties and other action by DEP to enforce the terms of this Restriction, pursuant to M.G.L. c. 21E and 310 CMR 40.0000; and~~

~~(ii) upon a determination by a court of competent jurisdiction, in the issuance of criminal and/or civil penalties, and/or equitable remedies (including but not limited to the issuance of an order to cease and desist from any activity performed in violation of the terms of the Restriction and/or an order to remove any improvements constructed on or within the Property in violation of the terms of the Restriction.~~

~~7. Provisions to Run With the Land. This Restriction creates rights, liabilities, agreements and obligations which shall run with the Property or any portion thereof. The rights hereby granted to DEP, its successors and assigns, constitute the perpetual right of DEP to enforce this Restriction and Grantor hereby covenants for himself/herself/itself and his/her/its executors, administrators, heirs, successors and assigns, to stand seized and hold title to the Property, or any portion thereof, subject to this Restriction, provided, however, that a violation of this Restriction shall not result in a forfeiture or reversion of Grantor's title to the Property.~~

~~8. Concurrence Presumed. It being agreed that Grantor and all parties claiming by, through or under Grantor shall be deemed to be in accord with the provisions herein set forth and to agree for and among themselves and any party claiming by, through or under them, and their respective agents, contractors, sub contractors and employees, that the Restriction herein established shall be adhered to and not violated and that their respective interests in the Property, or an portion thereof, shall be subject to the provisions herein set forth.~~

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~~9. Incorporation into Deeds, Mortgages, Leases and Instruments of Transfer. Grantor hereby agrees to incorporate this Restriction, in full or by reference, into all future deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer by which an interest in and/or a right to use the Property, or any portion thereof, is conveyed.~~

~~10. Amendment and Release. This Restriction may be amended or released in accordance with M.G.L. c. 21E and the MCP.~~

~~11. No Dedication Intended. Nothing herein shall be construed to be a gift or dedication of the Property to DEP or to the general public for any purpose whatsoever.~~

~~12. Term. This Restriction shall run in perpetuity [for a period of ____ years] and is intended to conform to M.G.L. c. 184, § 26.~~

~~13. Rights Reserved. It is expressly agreed that acceptance of this Restriction by DEP shall not express or imply DEP approval of the adequacy of this or any response action affecting the (select one) [Disposal Site] [Portion of the Disposal Site]. Nor shall acceptance of this Restriction operate to bar, diminish, or in any way affect any legal or equitable right of DEP to issue any future order with respect to the (select one) [Disposal Site] [Portion of Disposal Site] or in any way affect any other claim, action, suit, cause of action, or demand which DEP may have with respect thereto.~~

~~This Restriction shall become effective upon its recordation and/or registration with the appropriate Registry of Deeds and/or Land Registration Office.~~

~~As this Restriction is a gift, no Massachusetts deed excise stamps are affixed hereto, none being required by law.~~

WITNESS the execution hereof under seal this _____ day of _____, 19____.

~~[Name of Grantor]~~

~~[COMMONWEALTH OF MASSACHUSETTS]~~

~~STATE OF~~

_____, SS _____, 19____

~~Then personally appeared the above-named _____ and
acknowledged the foregoing instrument to be [his][her] free act and deed before me.~~

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Notary Public:
My _____ Commission

Expires:

~~The undersigned Waste Site Cleanup Professional hereby certifies that [he][she] executed the AUL Opinion, dated _____, and filed with Department of Environmental Protection under Release Tracking No(s). _____, attached hereto as Exhibit C and made a part hereof, and that in [his][her] Opinion this Restriction is consistent with the terms of said AUL Opinion.~~

Date: _____

[NAME OF LSP]
[LSP SEAL]

[COMMONWEALTH OF MASSACHUSETTS]
[STATE OF _____]

_____, ss _____
_____, 19____

~~Then personally appeared the above-named _____ and acknowledged the foregoing instrument to be [his][her] free act and deed before me,~~

Notary Public:
My _____ Commission

Expires:

~~In accordance with M.G.L. c. 21E, § 6, as amended, and the Massachusetts Contingency Plan, 310 CMR 40.0000, as amended, the Commissioner of the Department of Environmental Protection hereby approves this Grant of Environmental Restriction (as to form only).~~

Date: _____

Commissioner

Department of Environmental
Protection

Upon recording, return to:

Office of General Counsel

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Department of Environmental Protection
One Winter Street
Boston, MA

39. NOTE TO REVIEWERS: *DEP proposes to revise 310 CMR 40.1072(2)(a) to provide for the use of either Form 1072A or 1072 in an application for a Grant of Environmental Restriction.*

40.1072: Process for Applying for a Grant of Environmental Restriction

- (1) The Department shall review each application for a Grant of Environmental Restriction to ensure that it conforms to all requirements established herein for such instrument.
- (2) An application for a Grant of Environmental Restriction shall consist of:
 - (a) a completed Form 1072A or Form 1072 and, if applicable, Form 1072B, set forth in 310 CMR 40.1099,

40. NOTE TO REVIEWERS: *DEP proposes to add a new subsection at 310 CMR 40.1074(5) to emphasize the requirement set forth in Form 1075 that the terms of a Notice of Activity and Use Limitation (AUL) be incorporated into new instruments of transfer, such as deeds, mortgages, and leases. This practice ensures that future buyers and others examining title are informed of the applicable activity and use limitations. DEP's audit of AUL sites revealed that this requirement was not fulfilled in a number of property transfers.*

41. *The amendment at 40.1074(2)(a)4.b. is a correction. In the case of unregistered land, a reference to the recording information for the survey plan of the portion of the property subject to the AUL is included in the body of the AUL and should not be attached as an exhibit.*

40.1074: Notice of Activity and Use Limitation

...

(2) Contents of a Notice of Activity and Use Limitation. A Notice of Activity and Use Limitation shall contain the following information:

- (a) the location of the property, including:

...

2. a metes and bounds description of the parcel(s) of land which contain(s) the area that is subject to the Notice of Activity and Use Limitation;

...

4. if the area subject to the Notice of Activity and Use Limitation comprises only a portion of the property described in 310 CMR 40.1074(2)(a)2, a metes and bounds description of the portion subject to the Notice of Activity and Use Limitation; and

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...

b. (for unregistered land only) a reference to a survey plan of the portion subject to the Notice of Activity and Use Limitation, prepared by a Massachusetts Registered Land Surveyor, that has been recorded as a plan with the appropriate registry of deeds, ~~attached as an exhibit to the Notice of Activity and Use Limitation~~; and

...

(5) Upon transfer of any interest in and/or a right to use the property or a portion thereof that is subject to a Notice of Activity and Use Limitation, said Notice shall be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer.

42. NOTE TO REVIEWERS: DEP proposes revisions to 40.1074(1)(e) and 40.181(4)(c) to clarify that the 45-day interest holder notification period for AULs may be waived.

40.1074: Notice of Activity and Use Limitation

(1) General Requirements. At any disposal site or portion of a disposal site where a RP, PRP or Other Person is conducting a response action(s) for which a Notice of Activity and Use Limitation has been selected as a form of Activity and Use Limitation pursuant to 310 CMR 40.1070, the following requirements shall be met:

...

(e) ~~At least 45 days p~~Prior to the recording and/or registration of a Notice of Activity and Use Limitation pursuant to 310 CMR 40.1074(3), current holders of any record interest(s) in the area subject to the proposed Notice (including without limitation, owners, lessees, tenants, mortgagees, and holders of easements or licenses) shall be notified by certified mail, return receipt requested, of the existence and location of oil and/or hazardous material within such area and the terms of such proposed Notice. Such proposed Notice of Activity and Use Limitation shall not be recorded and/or registered until at least 45 days after such notification of current record interest holders has occurred, unless all parties receiving such notification provide a written waiver of the 45-day waiting period to the Department.

40.1081: Amendment of Activity and Use Limitations

...

(4) A Notice of Activity and Use Limitation shall be amended in accordance with the following:

...

(c) ~~at least 45 days p~~Prior to the recording and/or registration of an Amendment to Notice of Activity and Use Limitation pursuant to 310 CMR 40.1081(4)(d), current holders of any record interest(s) in the area subject to the proposed

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Amendment to Notice of Activity and Use Limitation (including without limitation, owners, lessees, tenants, mortgagees, and holders of easements or licenses) shall be notified by certified mail, return receipt requested, of the existence and location of oil and/or hazardous material within such area and the terms of such proposed Amendment to Notice of Activity and Use Limitation. Such proposed Amendment to Notice of Activity and Use Limitation shall not be recorded and/or registered until at least 45 days after such notification of current record interest holders has occurred, unless all parties receiving such notification provide a written waiver of the 45-day waiting period to the Department;

...

43. NOTE TO REVIEWERS: *DEP proposes to revise 310 CMR 40.1074(1)(d) to allow the voluntary implementation of an Activity and Use Limitation (AUL) to limit use of groundwater for purposes other than changing the groundwater category.*

40.1074: Notice of Activity and Use Limitation

(1) General Requirements. At any disposal site or portion of a disposal site where a RP, PRP or Other Person is conducting a response action(s) for which a Notice of Activity and Use Limitation has been selected as a form of Activity and Use Limitation pursuant to 310 CMR 40.1070, the following requirements shall be met:

(a) the Notice of Activity and Use Limitation shall be prepared using Form 1075 set forth in 310 CMR 40.1099;

(b) an Activity and Use Limitation Opinion shall be submitted on a form prescribed by the Department to the Department with a Response Action Outcome Statement pursuant to 310 CMR 40.1056(2)(g) and shall specify:

1. why the Notice of Activity and Use Limitation is appropriate to:
 - a. achieve and/or maintain a level of No Significant Risk for a Class A or B Response Action Outcome; or
 - b. eliminate a substantial hazard for a Class C Response Action Outcome.
2. Site Activities and Uses which are inconsistent with maintaining a condition of No Significant Risk or eliminating a Substantial Hazard;
3. Site Activities and Uses to be permitted; and
4. obligations and conditions necessary to meet the objectives of the Notice of Activity and Use Limitation;

(c) a Notice of Activity and Use Limitation shall be recorded and/or registered as specified in 310 CMR 40.1074(3);

(d) a Notice of Activity and Use Limitation shall not be used to limit access to and/or use of groundwater for the purpose of achieving a Class A or B RAO pursuant to 310 CMR 40.1035 and 310 CMR 40.1045; and

44. NOTE TO REVIEWERS: *DEP proposes to revise 40.1074(4)(c) and 40.1071(3) to expand the means by which proof that a request was made to marginally reference the AUL on the deed is submitted to DEP. The current regulations require that for any unregistered property for which an AUL is recorded, the AUL must be marginally referenced on the deed into the owner of the property, and that a copy of the deed bearing the marginal reference be submitted to DEP within 30 days. However, some registries do*

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not make the marginal reference within 30 days. Further, the current practice of many Registries of Deeds is to make the marginal reference electronically rather than to mark the actual deed in the book. To accommodate current registry practice, DEP proposes to accept proof of marginal references in two other forms: (1) a copy of the first page of the Notice, with a registry stamp in the margin reading "marginal reference requested Book_____, Page_____;" or a receipt from the Registry of Deeds, indicating that payment was made for the marginal reference.

40.1074: Notice of Activity and Use Limitation

...

(3) Recording/Registering Notices The property owner shall record and/or register any Notice of Activity and Use Limitation in the appropriate Registry of Deeds and/or Land Registration Office. If the property subject to the Notice of Activity and Use Limitation is unregistered land, such Notice of Activity and Use Limitation shall be marginally referenced on the deed into the owner of the subject property.

(4) Filing with the Department: Within 30 days of recording and/or registering any Notice of Activity and Use Limitation, the property owner shall submit the following to the Department:

(a) a certified Registry copy of the Notice bearing the book and page/instrument number and/or document number;

(b) a Registry copy of the required survey plan(s) referenced in the Notice, bearing the plan book/plan number(s); and

(c) if the property subject to the Activity and Use Limitation is unregistered land, proof that the marginal reference required by 310 CMR 40.1074(3) was made or will be made by the Registry in the form of:

1. a Registry copy of the deed into the owner of the property, bearing the marginal reference required by 310 CMR 40.1074(3);

2. a Registry copy of the deed into the owner of the property, and a copy of the first page of the Notice of Activity and Use Limitation, bearing the book and page number/instrument number and/or document number of the deed, and bearing a stamp from the Registry of Deeds indicating that the marginal reference was requested; or

3. a Registry copy of the deed into the owner of the property and a receipt of payment for the marginal reference from the Registry of Deeds, bearing the book and page number/instrument number and/or document number of the deed.

40.1071: Grants of Environmental Restrictions for Disposal Sites Where a RP, PRP Or Other Person Conducts Response Actions

...

(3) Recording/Registering Grants of Environmental Restriction. The Grant of Environmental Restriction shall be recorded and/or registered in accordance with the following:

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(a) the Grant of Environmental Restriction shall be duly recorded and/or registered by the property owner in the appropriate Registry of Deeds and/or Land Registration Office within 30 days of the property owner's receipt from the Department of the Grant of Environmental Restriction as approved by the Commissioner and, if the property subject to the Grant is unregistered land, shall be marginally referenced on the deed into the owner of the subject property; and

(b) within 30 days of recording and/or registering any Grant of Environmental Restriction, the property owner shall submit to the Department:

1. a certified Registry copy of the Grant of Environmental Restriction bearing the book and page/instrument number and/or document number;
2. a Registry copy of the required survey plan(s) referenced in the Grant of Environmental Restriction, bearing the plan book/plan number(s);
3. if the property subject to the Activity and Use Limitation is unregistered land, proof that the marginal reference required by 310 CMR 40.1071(3)(a) was made or will be made by the Registry in the form of:-

a. a Registry copy of the deed into the owner of the property, bearing the marginal reference required by 310 CMR 40.1071(3)(a);

b.. a Registry copy of the deed into the owner of the property, and a copy of the first page of the Notice of Activity and Use Limitation, bearing the book and page number/instrument number and/or document number of the deed, and bearing a stamp from the Registry of Deeds indicating that the marginal reference was requested; or

c. a Registry copy of the deed into the owner of the property and a receipt of payment for the marginal reference from the Registry of Deeds, bearing the book and page number/instrument number and/or document number of the deed.

45. NOTE TO REVIEWERS: *DEP proposes to revise 40.1080(1)(a) to correct an error in the existing language. When there is a change in site activities and uses that allows activities and uses not specifically permitted in the area of an AUL, the LSP Opinion must consider whether a condition of No Significant Risk exists, not whether a reporting threshold is exceeded.*

40.1080: Changes in Land Uses/Activities Or Other Site Conditions After an RAO Has Been Filed

(1) Identification of New Conditions of Significant Risk. Where a Response Action Outcome is based upon certain restrictions, limitations and/or conditions on Site Activities and Uses, any contemplated Site Activity and Use that is not specifically permitted by an Activity and Use Limitation and that may invalidate a finding of No Significant Risk or a conclusion that ~~no~~ substantial ~~hazards~~ remain shall be evaluated by an LSP before such changes in activities or uses are implemented. Following such an evaluation:

(a) an LSP Opinion on a form prescribed by the Department shall be provided as to whether, based on an evaluation of the contemplated Site Activity or Use pursuant to the risk characterization process in 310 CMR 40.0900, a condition

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~~of No Significant Risk will continue to exist if the contemplated changes in Activity and/or Use were to occur~~ ~~the proposed changes in Site Activities and Uses will exceed a reporting threshold pursuant to 310 CMR 40.0300~~; and

(b) any such Opinion which indicates that the objectives of the Activity and Use Limitation will no longer be met as a result of contemplated changes in ~~s~~Site ~~a~~Activity~~ies~~ and/or ~~u~~Uses, shall also specify any additional response actions necessary to maintain or achieve the objectives of the Activity and Use Limitation.

...

46. NOTE TO REVIEWERS: *DEP proposes revisions to 310 CMR 40.1083 and 40.1099 to reflect the additions of Form 1084D and Form 1084E to the regulations. These forms are to be used by property owners wishing to release or terminate an AUL because additional response actions are necessary to support a condition of No Significant Risk. Although DEP has issued the proposed forms to such property owners, incorporating them into regulation will provide access to all interested parties and is consistent with the current MCP requirement that all AULs be implemented on forms provided in 310 CMR 40.1099.*

Form 1072C is being removed from 40.1099, consistent with the proposal outlined in Notes to Reviewer #13 and #36 of this section that eliminates the Grant for Closed Private Drinking Water Wells.

40.1083: Release and Partial Release of Activity and Use Limitations

(1) Release of Activity and Use Limitation

(a) In cases where, as a result of additional response actions pursuant to 310 CMR 40.0000 conducted at a disposal site or a portion of a disposal site, a recorded and/or registered Activity and Use Limitation is no longer necessary to maintain a level of No Significant Risk, or to eliminate a substantial hazard, such Activity and Use Limitation shall be released as follows:

...

2. the Activity and Use Limitation shall be released in accordance with 310 CMR 40.1083(1)(~~de~~) or 310 CMR 40.1083(1)(~~ed~~), whichever is appropriate; and

...

(b) In cases where the termination of a Notice of Activity and Use Limitation is required pursuant to 310 CMR 40.1085, the Notice of Activity and Use Limitation shall be terminated in accordance with 310 CMR 40.1083(1)(~~ed~~). No LSP Opinion shall be required to terminate the Notice of Activity and Use Limitation, provided that the provisions of 310 CMR 40.1085 are satisfied.

(c) In cases where the Activity and Use Limitation is being released because additional response actions are necessary to support the conclusion that a condition of No Significant Risk has been achieved at the property or that all substantial hazards have been eliminated at the property, the Activity and Use Limitation shall be released in accordance with 310 CMR 40.1083(1)(d) or 310 CMR 40.1083(1)(e), whichever is appropriate.

(~~de~~) A Grant of Environmental Restriction shall be released in accordance with the following procedures:

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1. a Release of Grant of Environmental Restriction shall be prepared using ~~Form 1084A~~ the appropriate form set forth in 310 CMR 40.1099 and submitted to the Department for the Commissioner's signature, ~~accompanied by the LSP Opinion described in 310 CMR 40.1083(1)(a)~~ and the appropriate fee as established in 310 CMR 4.00;

...

(~~ed~~) A Notice of Activity and Use Limitation shall be terminated in accordance with the following procedures:

...

4. the person(s) signing the Termination of Notice of Activity and Use Limitation shall submit a statement, on a form prescribed by the Department, certifying that the person(s) or entity identified as the property owner(s) on the termination owned the property at the time the termination was recorded and/or registered pursuant to 310 CMR 40.1083(1)(~~ed~~)(3.);

5. local officials and the public shall be informed of the Termination of Notice of Activity and Use Limitation pursuant to 310 CMR 40.1403(7); and

6. within 30 days of recording and/or registering any Termination of Notice of Activity and Use Limitation, the property owner shall submit to the Department:

a. a certified Registry copy of the Termination of Notice of Activity and Use Limitation bearing the book and page/instrument number and/or document number;

b. if the property subject to the Activity and Use Limitation is unregistered land, a Registry copy of the deed into the owner of the property and the Notice of Activity and Use Limitation being terminated, bearing the marginal references required by 310 CMR 40.1083(1)(~~ed~~)3.

...

40.1099: Forms for Activity and Use Limitations

Form 1072A: Grant of Environmental Restriction

Form 1072B: Subordination Agreement

~~Form 1072C: Grant of Environmental Restriction for Closed Private Drinking Water Well(s)~~

Form 1075: Notice of Activity and Use Limitation

Form 1082A: Amendment to Grant of Environmental Restriction

Form 1082B: Amendment to Notice of Activity and Use Limitation

Form 1083A: Partial Release of Grant of Environmental Restriction

Form 1083B: Partial Termination of Notice of Activity and Use Limitation

Form 1084A: Release of Grant of Environmental Restriction (pursuant to 310 CMR 40.1083(1)(a))

Form 1084B: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR 40.14083(1)(a))

Form 1084C: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR 40.1083(1)(b))

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Form 1084D: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR 40.1083(1)(c))

Form 1084E: Termination of Grant of Environmental Restriction (pursuant to 310 CMR 40.1083(1)(c))

...

Form 1072A

GRANT OF ENVIRONMENTAL RESTRICTION

M.G.L. c. 21E, § 6 and 310 CMR 40.0000

...

4. Emergency Excavation. ... :

...

(iv) Engages an LSP to oversee the implementation of this Paragraph, and to prepare and oversee the implementation of a written plan which, in the LSP's Opinion, will restore the Restricted Area to a condition(s) that meets the objectives of the Grant of Environmental Restriction in accordance with 310 CMR 40.1071(2)(lk)

...

FORM 1084D

TERMINATION OF NOTICE OF ACTIVITY AND USE LIMITATION

M.G.L. c. 21E, § 6, 310 CMR 40.0000

Disposal Site Name: _____

DEP Release Tracking No.(s) _____

WHEREAS, a Notice of Activity and Use Limitation has been recorded with the _____ County Registry of Deeds in Book _____ Page _____, and/or registered with the Land Registration Office of the _____ County Registry District as Document No. _____ [as amended by Amendment to a Notice of Activity and Use Limitation dated _____, recorded with the _____ County Registry of Deeds in Book _____ Page _____, and/or registered with the Land Registration Office of the _____ County Registry District as Document No. _____] (said Notice of Activity and Use Limitation and any amendments thereto are collectively referred to herein as "Notice");

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WHEREAS, said Notice sets forth limitations on use and activities, conditions and obligations affecting certain [vacant] land situated in _____ (Town/City), _____ County, Massachusetts [with the buildings and improvements thereon], said land being more particularly bounded and described in Exhibit A attached hereto and made a part hereof ("Property");

WHEREAS, said limitations are consistent with the terms of an Activity and Use Limitation Opinion ("AUL Opinion") dated _____, signed and sealed by _____, holder of a valid license issued by the Board of Registration of Waste Site Cleanup Professionals, pursuant to M.G.L. c. 21A, §§ 19 through 19J (the holder being referred to as "LSP") attached to said Notice of Activity and Use Limitation as Exhibit C and made a part thereof, in order to (select one) [maintain at the Property a condition of No Significant Risk] [eliminate a substantial hazard] (said conditions and terms being defined in 310 CMR 40.0000); and

WHEREAS, said Notice is being terminated because additional response actions are necessary to support the conclusion that [a condition of No Significant Risk has been achieved at the property][all substantial hazards have been eliminated at the property].

NOW, THEREFORE, I/We of _____ (City/Town) _____ County, _____ (State), being the owner(s) of said Property, do hereby terminate said Notice.

(_____ Owner _____) authorizes and consents to the filing and recordation/and or registration of this Termination of Notice of Activity and Use Limitation, said Termination to become effective when recorded and/or registered with the appropriate Registry of Deeds and/or Land Registration Office.]

WITNESS the execution hereof under seal this _____ day of _____, 19 _____.

[Name of Owner]

[COMMONWEALTH OF MASSACHUSETTS]
[STATE OF _____]

_____, ss _____, 19 _____

Then personally appeared the above named _____ and acknowledged the foregoing to be [his]/[her] free act and deed before me,

Notary Public:
My Commission Expires:

Upon recording, return to:

(Name and Address of Owner)

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FORM 1084E

TERMINATION OF GRANT OF ENVIRONMENTAL RESTRICTION
M.G.L. c. 21E, §6 and 310 CMR 40.0000

Disposal Site Name: _____
DEP Release Tracking No.(s) _____

WHEREAS, a Grant of Environmental Restriction has been recorded with the _____ County Registry of Deeds in Book _____ Page _____, and/or registered with the Land Registration Office of the _____ County Registry District as Document No. _____ [as amended by Amendment to a Notice of Activity and Use Limitation dated _____, recorded with the _____ County Registry of Deeds in Book _____ Page _____, and/or registered with the Land Registration Office of the _____ County Registry District as Document No. _____] (said Grant of Environmental Restriction and any amendments thereto are collectively referred to herein as "Grant");

WHEREAS, said Grant sets forth limitations on use and activities, conditions and obligations affecting certain [vacant] land situated in _____ (Town/City), _____ County, Massachusetts [with the buildings and improvements thereon], said land being more particularly bounded and described in Exhibit A attached hereto and made a part hereof ("Property");

WHEREAS, said limitations are consistent with the terms of an Activity and Use Limitation Opinion ("AUL Opinion") dated _____, signed and sealed by _____, holder of a valid license issued by the Board of Registration of Waste Site Cleanup Professionals, pursuant to M.G.L. c. 21A, §§ 19 through 19J (the holder being referred to as "LSP") attached to said Grant as Exhibit C and made a part thereof, in order to (select one) [maintain at the Property a condition of No Significant Risk] [eliminate a substantial hazard] (said conditions and terms being defined in 310 CMR 40.0000); and

WHEREAS, said Grant is being released because additional response actions are necessary to support the conclusion that [a condition of No Significant Risk has been achieved at the property][all substantial hazards have been eliminated at the property].

NOW, THEREFORE, I/We, of _____ (City/Town) _____ County, _____ (State), being the owner(s) of said Property, do hereby release said Grant.

(____ Owner _____) authorizes and consents to the filing and recordation/and or registration of this Release of Grant of Environmental Restriction, said Release to become effective when recorded and/or registered with the appropriate Registry of Deeds and/or Land Registration Office.]

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WITNESS the execution hereof under seal this _____ day of _____, 19 ____.

[Name of Owner]

[COMMONWEALTH OF MASSACHUSETTS]
[STATE OF _____]

_____, SS _____, 19 ____

Then personally appeared the above named _____ and acknowledged the foregoing to be [his]/[her] free act and deed before me,

Notary Public:
My Commission Expires:

Upon recording, return to:

(Name and Address of Owner)

PROPOSED REVISIONS TO SUBPART K: AUDITS AND COMPLIANCE ASSISTANCE

47. NOTE TO REVIEWERS: *DEP proposes to revise 310 CMR 40.1140 to provide that any person who is required to comply with an Audit Follow-up Plan may request, in writing, a modification thereof prior to the running of any applicable deadline and that such modifications require DEP's written approval.*

40.1140: Notice of Audit Findings

(1) Except with respect to an audit that consists solely of ~~a site inspection and/or~~ an examination of documents within the Department's records or in other public records, the Department shall issue a Notice of Audit Findings at the conclusion of an audit. Such notice shall include the following information:

...

(5) Any person who is required to comply with an Audit Follow-up Plan may request, in writing, a modification thereof prior to the running of any applicable deadline. Any resulting modification approved by the Department shall be in writing.

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PROPOSED REVISIONS TO SUBPART N: PUBLIC INVOLVEMENT AND TECHNICAL ASSISTANCE GRANTS

48. NOTE TO REVIEWERS: *DEP proposes to add environmental justice criteria to the Technical Assistant Grant requirements.*

40.1457: Grant Selection Process

...

(3) Evaluation Criteria.

...

- (c) Relevance of the location of the disposal site in an area:
1. for local economic development efforts, as determined by the disposal site's location in an area designated by the Massachusetts Economic Assistance Coordinating Council as an "Economic Target Area" pursuant to MGL c. 23A, §§ 3A-3F; or
2. designated as an Environmental Justice Community, as defined by the Executive Office of Environmental Affairs' Environmental Justice Policy.
(Maximum score -- 3 points)

...

49. NOTE TO REVIEWERS: *DEP proposes to delete the reference to "original" signatures in the Bill of Lading (BOL) requirements to facilitate the electronic submittal of BOLs.*

40.0034: Bill of Lading Process

- (1) Remediation Waste transported from a site under a Bill of Lading process, as described in 310 CMR 40.0030, shall be transported under a Bill of Lading in a form established by the Department for such purposes, which shall contain, without limitation, the information, Opinions, and certifications listed at 310 CMR 40.0035.

...

- (5) A completed Bill of Lading containing an original signature of a representative of the receiving facility or receiving location shall be submitted to the Department within 30 days of the date of final shipment from the disposal site or storage/consolidation area, except for shipments of soils resulting from a Limited Removal Action conducted in accordance with 310 CMR 40.0318.

...

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40.0035: Bill of Lading Form

(1) The Bill of Lading shall contain, at a minimum, the following information, opinions, and certifications:

- (a) the address of the disposal site where the Remediation Waste was originally excavated or collected, and the address of any interim stockpiling, storage, and/or consolidation location;
- (b) the name, address, and telephone number of the RP, PRP, or Other Person conducting the response action;
- (c) the name and address of the transporter;
- (d) the name and address of the receiving facility or location;
- (e) except for Bills of Lading completed for Limited Removal Actions, as described in 310 CMR 40.0318, the Release Tracking Number for the disposal site where the Remediation Waste originated;
- (f) the estimated volume of Remediation Waste that will be shipped to the receiving facility;
- (g) the nature and composition of Remediation Waste that will be shipped to the receiving facility or storage location and the applicable Reportable Concentration reporting category for soil and/or groundwater described at 310 CMR 40.0360 associated with such Remediation Waste;
- (h) the ~~original~~ signature and seal of a Licensed Site Professional related to the rendering of an Opinion on the adequacy of testing and assessment actions undertaken to characterize the Remediation Waste, and on whether the Remediation Waste, as characterized, conforms with permitting and regulatory requirements for acceptance at the receiving facility or location, or the dated signature of an authorized representative of the Department, certifying the adequacy of testing and assessment actions undertaken to characterize the Remediation Waste, and approving of its shipment to the listed receiving facility or location;
- (i) the ~~original~~ dated signature of the RP, PRP, or Other Person conducting the response action, certifying the accuracy and completeness of the Bill of Lading, as specified in 310 CMR 40.0009; and
- (j) upon completion of all shipping activities, the ~~original~~ dated signature of a representative of the receiving facility or location, attesting to the total volume or weight of Remediation Waste received by the facility or location.

(2) The Bill of Lading, or reproduction of the Bill of Lading, containing all information described in 310 CMR 40.0035(a) through (i), shall accompany each shipment of Remediation Waste transported from a disposal site.

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50. NOTE TO REVIEWERS: *The revision proposed at 310 CMR 40.0720(5) corrects the Notice of Extended Review Period to be consistent with the intent to provide an additional 45 days (or 90 total) from the date of the original application was submitted.*

40.0720: Approval Process for Tier I Permit Applications, Major Modifications, Transfers or Extensions.

(1) General. 310 CMR 40.0720 through 40.0729, cited collectively as 310 CMR 40.0720, together with 310 CMR 4.04, define the approval process for Tier I Permit Applications or a Modification, Transfer or Extension of a Tier I Permit.

...

(5) If the Department issues the applicant(s) a Notice of Extended Review in accordance with 310 CMR 40.0720(4)(c), the Tier I Permit or a Major Modification, Transfer or Extension of a Tier I Permit shall be presumed approved without conditions ~~4590~~ days from the date the complete Application was received by the pursuant to 310 CMR 40.0720(3), Department issued the Notice of Extended Review, unless within prior to the end of the 45 days of the date on which the Department issues the Notice of Extended Review-period, the Department provides to the applicant(s) with one of the following:

- (a) a Decision to deny the applicant a Tier I Permit or a Major Modification, Transfer or Extension of a Tier I Permit, based upon the criteria in 310 CMR 40.0730 and 40.0731; or
- (b) a Decision to grant the applicant a Tier I Permit or a Major Modification, Transfer or Extension of a Tier I Permit with conditions pursuant to 310 CMR 40.0740(3)(n), based upon the criteria in 310 CMR 40.0730.

...